Supreme Court, U.S.
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No. 99-

IN THE
SUPREME COURT OF THE UNITED STATES

ELBA LLAMPALLAS,

Petitioner,

v.

MINI-CIRCUITS LAB., INC., MINI CIRCUITS LAB., INC. by and through its Assignee, DONALD KAPLAN, and PALMETTO EXTRA CONDOMINIUM ASSOCIATION, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

William G. Bell
Counsel of Record
9853 North Tamiami Trail
Suite 209-211
Naples, Florida 34108
(941) 593-1313
Attorney for Petitioner

Date: July 9, 1999

QUESTION PRESENTED

1. Is an employer liable for sexual harassment where the employee, who was the victim of same-sex harassment by her supervisor, did not during an interview with the president of the corporation explicitly state that her difficulties with the supervisor were the result of sexual harassment, in the following circumstances: (1) The harassment resulted in the discharge of the employee, and (2) The employer had not promulgated an anti-harassment policy with a complaint procedure or taken any other steps to prevent sexual harassment behavior.

LIST OF PARTIES

ELBA LLAMPALLAS
MINI-CIRCUITS LAB., INC.
SCIENTIFIC CORPORATION, INC. (Parent Company of Mini-Circuits Lab., Inc.)
DONALD KAPLAN
PALMETTO EXTRA CONDOMINIUM ASSOCIATION, INC.
SILVIA CABRERA

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Elba Llampallas, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The order of the United States Court of Appeals for the Eleventh Circuit denying the Suggestion for Rehearing *En Banc* (App. at 61-62) is not reported. The opinion of the United States Court of Appeals for the Eleventh Circuit (App. at 1) is reported at 163 F.3d 1236 (11th Cir. 1998). The opinions of the United States District Court for the Southern District of Florida (App. at 32, 50 and 59) are not reported.

JURISDICTIONAL STATEMENT

The District Court entered judgment in favor of Petitioner Llampallas and against Respondent Mini-Circuits Lab., Inc. and Palmetto Extra Condominium Association, Inc. on her Title VII sexual harassment claim and against Plaintiff Silvia Cabrera on her Title VII retaliation claim. On Respondent Mini-Circuits Lab., Inc. and Palmetto Extra Condominium Association, Inc.'s appeal and Plaintiff Silvia Cabrera's cross appeal, the Eleventh Circuit on December 28, 1998, reversed the district court's judgment for Petitioner Llampallas against Respondent Mini-Circuits Lab., Inc. and Palmetto Extra Condominium Association, Inc. and ordered judgment be entered for Respondent Mini-Circuits Lab., Inc. and Palmetto Extra Condominium Association. The Eleventh Circuit affirmed the district court's judgment against Plaintiff Cabrera. On April 12, 1999, the Court of Appeals denied Petitioner's timely-filed Suggestion for Rehearing *En Banc* of

the Eleventh Circuit's reversal of the District Court's judgment for Petitioner Llampallas against Mini-Circuits Lab., Inc., which also serves as a petition for rehearing under Eleventh Circuit Rule 35-6. This Petition for Writ of Certiorari is filed within ninety (90) days of the Court of Appeals' April 12, 1999 Order. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1994).

STATUTORY PROVISION INVOLVED

This case involves Section 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1994), which provides as follows:

§2000e-2(a) It shall be an unlawful employment practice for an employer-

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

QUESTION PRESENTED

1. Is an employer liable for sexual harassment where the employee, who was the victim of same-sex harassment by her supervisor, did not during an interview with the president of the corporation explicitly state that her difficulties with the supervisor were the result of sexual harassment, in the following circumstances: (1) The harassment resulted in the discharge of the employee, and (2) The employer had not promulgated an anti-harassment policy with

a complaint procedure or taken any other steps to prevent sexual harassment behavior.

STATEMENT OF THE CASE

This case arises out of the discharge of Petitioner Llampallas from her position as the Production Supervisor for Respondent Mini-Circuits, when she refused to continue and later to resume a lesbian relationship with her immediate supervisor, General Manager Blanch.

After a trial before the District Court, the District Court entered a memorandum opinion finding that during the thirteen year relationship, Blanch had told Petitioner Llampallas that if their relationship terminated Blanch would see that Llampallas would lose her job – that the President of the Corporation, Harvey Kaylie, would always prefer Blanch to Llampallas. In September of 1990 when Petitioner Llampallas told Blanch that she wished to terminate the relationship, Blanch insisted the relationship be resumed and threatened to have Llampallas fired, if she did not resume the relationship. When Llampallas refused on May 23, 1991, Blanch called the President of the Respondent Mini-Circuits in New York and told him she was resigning because she could no longer work with Llampallas. Kaylie told Blanch not to resign and ordered Llampallas to come to New York to see him. The District Court made no findings as to what was discussed during the meeting between Petitioner Llampallas and Kaylie, but the testimony at trial was to the effect that Petitioner Llampallas told him she and Blanch had a personal problem, but did not inform him that it was due to her refusal to resume the sexual relationship. After the meeting, Kaylie put Llampallas on a paid suspension, and then in November 1991, terminated her employment.

The District Court found that there was direct evidence of sexual harassment and that Respondent Mini-Circuits had not proved by a preponderance of the evidence that it would have discharged Llampallas for a non-discriminatory reason. The District Court specifically found that ". . . the harassment affected a tangible aspect of Llampallas' employment in that Blanch made good on her threat and got Llampallas fired."

In a Supplemental Memorandum Opinion and Order the District Court found that Petitioner's past and future damages for wages was $1,736,256.48 and that Petitioner had not proved entitlement to compensatory or punitive damages.

The evidence before the District Court was that Respondent Mini-Circuits published a policy on sexual harassment after this lawsuit was filed. This was not a contested issue in the trial and the District Judge made no findings on it.

The Eleventh Circuit recognized that Blanch's threat to resign was a "fake" threat designed "to manipulate the company into firing Llampallas because of her sex." However, the Eleventh Circuit focused on the fact that Petitioner Llampallas had not explicitly raised the issue of sexual harassment with Kaylie when he interviewed her prior to his decision to suspend her and later discharge her. The Eleventh Circuit held that the employer was not liable for sexual harassment because the harasser did not personally take the adverse employment action and the employer did not have actual or constructive knowledge of the harassment. The Eleventh Circuit concluded that the employer did not have actual or constructive knowledge because Petitioner did not during an interview with the president of the corporation state

that her difficulties with her supervisor was the result of sexual harassment.

REASON FOR GRANTING THE WRIT

Review by writ of certiorari is a matter of judicial discretion that should be favorably exercised in those cases in which a conflict exists between or among the United States courts of appeal on an important federal question or an important federal question has been decided by a United States court of appeals in a way that conflicts with relevant decisions of this Court. Supreme Court Rules 10(a) and (c). This case meet both of those requirements.

I.

The Eleventh Circuit's Decision Is In Direct Conflict With This Court's Recent *Burlington* and *Faragher* Decisions.

The decision of the court below conflicts with the decisions of this Court in *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275 (1998). This Court held in *Burlington* and in *Faragher* that when a supervisor with immediate (or successively higher) authority sexually harasses a subordinate, the employer is (a) strictly liable if the harassment culminates in an adverse employment action, and (b) liable but with an affirmative defense, if the harassment does not culminate in an adverse employment action. *Burlington*, 524 U.S. at --, 118 S.Ct. at 2270, *Faragher*, 524 U.S. at --, 118 S.Ct. at 2292-93.

A. The Eleventh Circuit Erred In Holding That The Employer Is Not Liable For Sexual Harassment Unless The Harassing Worker Took The Adverse Employment Action.

This Court held in *Burlington* and *Faragher* that an employer is liable in all cases where the harassment culminates in an adverse employment action. *Burlington*, 524 U.S. at --, 118 S.Ct. at 2270; *Faragher*, 524 U.S. at --, 118 S.Ct. at 2292-93.

The Eleventh Circuit described that holding as "dicta" and limited to situations where the decisionmaker who terminates is also the harasser. As the Eleventh Circuit said:

> [A]lthough the Court's use of the term 'culminates' may appear to draw within the ambit of the exception all those situations in which the harasser's sexually discriminatory animus is a 'but for' cause of the tangible employment action, we believe that the Court means to limit the exception to those cases in which the harasser acts as the decisionmaker with respect to the action, either in actuality or by using another as 'cat's paw.'

(App. 28, n.23). Having brushed off this Court's holding as to liability when the supervisor's harassment culminates in an adverse employment action, the Eleventh Circuit essentially established a new affirmative defense. An employer is not liable for the sexual harassment of its supervisor against subordinate employees even if the employee is terminated and even if it has no sexual harassment policy, if the employee fails to take advantage of an opportunity to report the harassment to

higher management. That rule gives employers substantially less responsibility for avoiding and preventing sexual harassment and the employee substantially less rights than the affirmative defense established by this Court in *Burlington* and *Faragher*.

This Court held in *Burlington* and *Faragher* for an employer to have an affirmative defense when there is harassment but no tangible employment action, the employer must show that it has exercised reasonable care to prevent and correct promptly any sexually harassing behavior. *Burlington*, 524 U.S. at --, 118 S.Ct. at 2270; *Faragher*, 524 U.S. at --, 118 S.Ct. at 2293. This action by the employer creates an obligation for the employee to take advantage of any preventive or corrective opportunities provided by the employer. *Burlington*, 524 U.S. at --, 118 S.Ct. at 2270. Under the Eleventh Circuit's decision, the employer can (1) take harsher action than was involved in either *Burlington* or *Faragher*, (2) not have any stated policy against sexual harassment, and (3) escape liability if the employee has not taken advantage of any opportunity to tell higher management of the sexual harassment.

The unfairness of the principle of law created by the Eleventh Circuit's decision is illustrated by the facts in this case. The employer had no policy forbidding sexual discrimination and no policy that would instruct an employee as to her rights and protection against retaliation, if she revealed the sexual discrimination. The employee was a woman of limited education who spoke limited English. Yet, the Eleventh Circuit blamed Petitioner Llampallas, whose supervisor threatened to fire her, for not reporting the sexual harassment to the Company President. The Respondent, on the other hand, through its owner, Scientific Components

Corporation, had on retainer a law firm specializing in employment law.

The Eleventh Circuit has created a rule of law that essentially makes it advantageous for an employer to not issue a policy on sexual harassment that would educate employees as to their rights. This Court in *Burlington* and *Faragher* spelled out the protection to be accorded victims of sexual harassment that were not subjected to an adverse employment action, and *a fortiori*, it is important that at least equal protection be spelled out for employees that are discharged.

B. The Eleventh Circuit Erred In Requiring The Employer To Have Actual Or Constructive Knowledge Of The Harassment In Order To Be Held Liable.

Rather than follow this Court's *Burlington* and *Faragher* decisions, the Eleventh Circuit attempted to reinstate its decision in *Faragher v. City of Boca Raton*, 111 F.3d 1536 (11th Cir. 1997) (*en banc*), which this Court reversed. In its *Faragher* decision, the Eleventh Circuit held that the City of Boca Raton could not be liable for sexual harassment by its employees where it had no actual or constructive knowledge of the harassment. *Id.*, at 1539.

This Court rejected that analysis. This Court held that:

> [a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending

> employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule. Civ. Proc. 8(c).

Burlington, 524 U.S. at --, 118 S.Ct. at 2270; *Faragher*, 524 U.S. --, at 118 S.Ct. at 2293. That analysis accommodated the principle that employers should be vicariously liable for harm "caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees . . . ." *Faragher,* 524 U.S. at --, 118 S.Ct. at 2292.

The Eleventh Circuit rejected that decision and held for Respondent Mini-Circuits because it concluded that Mini-Circuits did not have actual or constructive knowledge of the harassment by its supervisor. (App. at 30). According to the Eleventh Circuit, because Llampallas did not complain specifically about the harassment during a meeting with the Company President, the Company had no actual knowledge. (App. at 29). Constructive knowledge did not exist because Kaylie's meeting with Llampallas "negate[d] any inference that Kaylie had mere constructive knowledge that Blanch was harassing Llampallas based on Llampallas's sex." (App. at 30, n.24).

However, under this Court's recent decisions in *Burlington* and *Faragher*, actual or constructive knowledge is irrelevant. Under those decisions, the focus is on "whether the harasser has immediate or successively higher authority over the victim of the harassment, not on whether the employer knew about the harassment." *Burrell v. Star Nursery, Inc.*, 170 F.3d 951, 956 (9th Cir. 1999). Thus, where the harasser has supervisory authority over the victim, courts should presume

that the employer is vicariously liable for the harassment. *Id.* This presumption may be overcome only if the harassment did not culminate in a tangible employment action and the employee establishes the affirmative defense set forth by this Court in *Burlington* and *Faragher*. *Id.*

The Eleventh Circuit's decision is in direct conflict with *Burlington* and *Faragher*. If the decision is not reversed, it will at a minimum confuse this area of Title VII law, which this Court's recent decisions clarified, and at worst eviscerate the effect of those clarifying decisions, where there is an adverse employment action.

II.

The Eleventh Circuit's Decision Is In Direct Conflict With The Ninth Circuit's Decision In *Burrell v. Star Nursery, Inc.*

The Eleventh Circuit's decision in the instant case directly conflicts with the Ninth Circuit's decision in *Burrell v. Star Nursery, Inc.*, 170 F.3d 951 (9th Cir. 1999).

The plaintiff in *Burrell* alleged she had been sexually harassed by two of her supervisors, who were members of management as well as co-employees. *Id.* at 953. Prior to her discharge she had a meeting with management to discuss the conflicts between herself and her supervisor. *Id.* In that meeting she never mentioned any alleged incidents of sexual harassment. *Id.* Later she was discharged by management, not her supervisor. *Id.* at 954. The Ninth Circuit held that if the sexual harassment resulted in the plaintiff's discharge the employer was liable, and that it would only have an affirmative defense if the sexual harassment created a hostile work

environment, but did not result in her discharge. *Id.* at 956. The Ninth Circuit relied on this Court's decisions in *Burlington* and *Faragher* saying:

> This new rule overturns Ninth Circuit precedent as to employer liability for Title VII sexual harassment by supervisory personnel. In such a situation, the new rule focuses on whether the harasser has immediate or successively higher authority over the victim of the harassment, not on whether the employer knew about the harassment. *Burlington Indus.*, 118 S.Ct. at 2270. Thus, if the harassment is actionable and the harasser has supervisory authority over the victim, we presume that the employer is vicariously liable for the harassment. This presumption may be overcome only if the alleged harassment has not culminated in a tangible employment action, and then only if the employer can prove both elements of the affirmative defense.

Id.

This decision by the Ninth Circuit directly conflicts with the Eleventh Circuit's decision in the instant case.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

William G. Bell
Counsel of Record
9853 North Tamiami Trail
Suite 209-211
Naples, Florida 34108
(941) 593-1313
Attorney for Petitioner

Of Counsel:
James H. Bratton, Esq.
Smith, Gambrell & Russell, LLP
1230 Peachtree Street, N.E.
Suite 3100, Promenade II
Atlanta, Georgia 30309-3592
(404) 815-3500

APPENDIX

App. 1

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 95-5258

D.C. Docket No. 93-CV-2053-CIV-ATKINS

ELBA LLAMPALLAS,

Plaintiff-Appellee,

versus

MINI-CIRCUITS, INC., MINI-CIRCUITS, INC., PALMETTO EXTRA CONDOMINIUM ASSOCIATION, INC.,

Defendants-Appellants.

No. 95-5278

D.C. Docket No. 93-CV-2053-CIV-ATKINS

SILVIA CABRERA,

Plaintiff-Appellant,

versus

MINI-CIRCUITS, LAB., INC., PALMETTO EXTRA CONDOMINIUM ASSOCIATION, INC.,

Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Florida

App. 2

(December 28, 1998)

Before TJOFLAT and EDMONDSON, Circuit Judges, and O'NEILL*, Senior District Judge.

*Honorable Thomas N. O'Neill, Jr., Senior U.S. District Judge for the Eastern District of Pennsylvania, sitting by designation.

TJOFLAT, Circuit Judge:

In this case, two lesbian women who had a long-term sexual relationship, Marta Blanch and Elba Llampallas, worked together at the defendant company, Mini-Circuits, Inc. After their sexual relationship ended, Blanch sexually harassed Llampallas, telling Llampallas that if she did not resume the sexual relationship, Blanch would have Llampallas fired. Llampallas did not resume the relationship. Blanch then called the president of Mini-Circuits, Harvey Kaylie, and told Kaylie that she was quitting because she could not work with Llampallas anymore. In response to Blanch's call, Kaylie held a private meeting with Llampallas. Kaylie then suspended and eventually fired Llampallas. Llampallas brought suit against Mini-Circuits under *42 U.S.C. § 2000e et seq.* (1994) ("Title VII" or the "Act"), claiming that she was unlawfully terminated "because of" her sex. After a bench trial, the district court held that Mini-Circuits was liable under a theory of strict liability for unlawful quid pro quo sexual harassment.[1]

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[1] Llampallas brought claims both against Mini-Circuits and against another entity, a non-profit condominium management association, for the loss of her position at Mini-Circuits. She also brought claims against both Mini-Circuits and the condominium association for the loss of her officer-director position at the condominium association. We discuss these claims below, but concentrate in this introduction on what we consider the main issue of the case: whether an employer can be held liable under Title

Mini-Circuits now appeals, arguing that it cannot be held liable to Llampallas under Title VII because Kaylie, not Blanch, fired Llampallas. We hold that Llampallas failed to prove a causal link between the harassment and her discharge sufficient to establish that Mini-Circuits violated Title VII by discriminating against her "because of" her sex. We therefore reverse the judgment of the district court.

I.

In approximately 1977, Elba Llampallas met Marta Blanch in New Jersey and the two women began a consensual sexual relationship. They moved to Florida, bought a house together, and opened a joint bank account out of which they paid all their household expenses. They also gained employment at the same company; Mini-Circuits, Inc., hired Blanch as General Manager of its Hialeah, Florida facility and then hired Llampallas as an assembler at the same plant.[2] Llampallas was eventually promoted to Production Supervisor at Mini-Circuits, a position she held at all times relevant to this litigation. As the Production Supervisor, Llampallas reported to Blanch. Blanch in turn reported to Harvey Kaylie, President

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VII for the sexual harassment of its employee by another worker if the harassing worker did not take the "tangible employment action", *see Burlington Indus., Inc. v. Ellerth*, 524 U.S.--, --, 118 S.Ct. 2257, 2268, 141 L. Ed. 2d 633 (1998)(defining a "tangible employment action" as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits"), against the employee on which the employee bases her suit.

[2] The record does not establish what Llampallas' duties were as an assembler. It appears that assemblers were the lowest-ranking employees at the Hialeah facility.

of Mini-Circuits, who resided in New York.[3] Kaylie's relationship with Blanch and Llampallas was both professional and social. He visited their home on several occasions and dined with them. Kaylie also transferred title of a company car to Llampallas, hired Llampallas' two sons to work at the Mini-Circuits Hialeah facility, and extended both women "company" loans on very favorable terms.

Mini-Circuits consistently awarded both Blanch and Llampallas substantial raises and bonuses for their work at Hialeah. The record reveals no criticism of either woman's performance.

In the fall of 1990, Blanch and Llampallas ended their sexual relationship and Blanch moved out of the house.[4] Blanch then began to threaten Llampallas, telling Llampallas that if Llampallas did not resume their sexual relationship Blanch would have Llampallas fired.[5] These threats occurred on several occasions and were witnessed by several other Mini-Circuits employees.[6]

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[3] Kaylie, along with his wife and two daughters, owns more than ninety percent of the stock of Scientific Components Corporation. Mini-Circuits is a wholly-owned subsidiary of Scientific. Scientific is not a party to this suit.

[4] In April 1991, Kaylie extended a company loan to Llampallas to enable her to buy Blanch's half of the residence.

[5] The district court found that Blanch had made similar threats before the break-up regarding the consequences for Llampallas if Llampallas ended her relationship with Blanch.

[6] Sylvia Cabrera was one of these witnesses. Mini-Circuits later dismissed Cabrera, and she filed suit as Llampallas' co-plaintiff in this action, arguing that Mini-Circuits had unlawfully retaliated against her for

On May 23, 1991, after a particularly bitter altercation with Llampallas, Blanch called Kaylie in New York. Blanch told Kaylie that she was resigning because she could no longer work with Llampallas. Kaylie told Blanch not to resign. Kaylie then contacted Llampallas and instructed Llampallas to come to New York to meet with him.

Llampallas flew to New York on May 24, 1991, and met with Kaylie for about two hours. The district court made no factual findings regarding the content of that meeting. Both Kaylie and Llampallas testified at trial that they discussed Llampallas' work performance, and that Kaylie suggested that Llampallas manage a different facility for Mini-Circuits. Both also testified that at some point during their conversation, Llampallas told Kaylie that she and Blanch were having a "personal problem."[7]

After her meeting with Kaylie in New York, Llampallas returned to Hialeah. Kaylie then told Llampallas that he was placing her on suspension with full pay. He informed her that he was contemplating opening another, smaller Mini-Circuits

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being a potential witness to a Title VII violation. Following the bench trial in this case, the district court found that Cabrera had failed to establish a prima facie case of discrimination under Title VII and therefore entered final judgment for Mini-Circuits. Cabrera now appeals. We affirm the district court's judgment under local Eleventh Circuit Rule 36-1. *See* 11th Cir. R. 36-1.

[7] Llampallas testified that she believed Kaylie knew she and Blanch were lovers because Kaylie had visited their home on several occasions and must have seen that she and Blanch shared a bedroom. Kaylie denied knowing that Blanch and Llampallas were homosexual, let alone that they were involved in a sexual relationship with each other, until Llampallas filed sexual discrimination charges with the Equal Employment Opportunity Commission based on Blanch's harassment.

office and told Llampallas that he might transfer her there. During Llampallas' suspension, Mini-Circuits flew her to New York on several occasions to train her for her new position. Llampallas also looked for property that Mini-Circuits could buy or lease for the new facility. On November 8, 1991, however, Kaylie informed Llampallas by letter that there would be no additional Mini-Circuits facility, and that her employment with Mini-Circuits had been terminated.

On January 22, 1992, Llampallas received another letter, signed by Blanch and on Mini-Circuits' stationery, removing Llampallas from her position as Vice President and member of the Board of Palmetto Extra Condominium Association, Inc., a co-defendant in this action. Palmetto is a non-profit corporation formed to operate, manage, and administer a commercial condominium with seven units in Hialeah, Florida. Membership in Palmetto is predicated on ownership of a condominium unit; each unit owner is a member and receives one vote in all membership decisions. Six of the seven units in the condominium that Palmetto manages are owned by Scientific Components Corporation, Mini-Circuits' parent company. See supra note 3. Scientific leases these six units to Mini-Circuits for its operations. The seventh unit is owned by Irest Corporation, an entity not named as a defendant in this suit.[8]

In accordance with Palmetto's Articles of Incorporation and by-laws, Palmetto is run by a board of three Directors elected by the corporation's members. The Board oversees the corporation and appoints officers (President, Vice President, Secretary, and Treasurer) to conduct the corporation's day-to-day business. When Palmetto was first incorporated, the Board

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[8] Irest has no connection to Scientific or to Mini-Circuits.

of Directors consisted of three of the condominium's developers; the developers also filled all officer positions. When the developers released the condominium to the unit owners, the owners nominated and elected Llampallas, Blanch, and Kaylie as the new Board. Llampallas, Blanch, and Kaylie then appointed themselves to fill all officer positions for Palmetto - Llampallas served as Vice President. On December 12, 1991, Kaylie and Blanch met as a quorum of the Palmetto Board (Llampallas was absent) and voted to remove Llampallas both from the Board and from her position as Vice President of the association.

After Llampallas received the letters from Palmetto and Mini-Circuits terminating her positions with those companies, she attempted to find other work. Llampallas was unable to obtain comparable or even permanent employment anywhere else.

On October 19, 1993, Llampallas brought suit against both Mini-Circuits and Palmetto in the Southern District of Florida under Title VII. She alleged that Blanch had conducted a campaign of "quid pro quo sexual harassment" against her and that Mini-Circuits and Palmetto were strictly liable for that harassment. Llampallas claimed that the harassment resulted in the loss of both her position as Production Supervisor at Mini-Circuits and her position as officer-director at Palmetto. She sought relief in the form of back pay, reinstatement, compensatory and punitive damages, attorneys' fees, and costs.

Following a bench trial, the district court found that Blanch had engaged in "quid pro quo harassment" of Llampallas. It also found that Mini-Circuits' proffered reason

for Llampallas' discharge was wholly non-credible.[9] The court concluded that Mini-Circuits was "strictly liable for Blanch's harassment" because Blanch had forced Mini-Circuits to discharge Llampallas by threatening to quit herself. The court also found that "Palmetto's discharge of Llampallas from her Board position and officer duties was a direct result of Llampallas' discharge from Mini-Circuits"; thus, the court decided, Llampallas was also entitled to recovery under Title VII for the loss of her officer-director position at Palmetto. The court then held that both Palmetto and Mini-Circuits were jointly liable for Llampallas' loss of both her position at Mini-Circuits and her positions at Palmetto because the two entities were a "single employer" under Title VII.

Because it determined that the parties had inadequately briefed the issue of damages, the court requested supplemental memoranda of law on the issue. After considering the memoranda, the court awarded Llampallas back pay and front pay totaling $1,736,256.48.

Mini-Circuits and Palmetto now appeal. Their arguments and our holdings are as follows.

(1) Both Mini-Circuits and Palmetto claim that they cannot be held liable to Llampallas for the loss of her position as officer-director of Palmetto because she was not an "employee" in that position. We agree. We therefore vacate the portion of the district court's judgment based on the loss of her director-officer position.

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[9] Mini-Circuits claimed that Llampallas was fired because she failed to implement the company's new management philosophy.

(2) Palmetto claims that it is not subject to suit under Title VII because it is not an "employer" under the statute. We agree. We therefore vacate the portion of the district court's judgment assessing liability against Palmetto and remand with directions to dismiss Palmetto from this suit.

(3) Both Mini-Circuits and Palmetto claim that the district court erred in holding them strictly liable based on Blanch's harassment of Llampallas because Blanch did not use her actual or apparent authority to take an adverse employment action against Llampallas. We hold that Llampallas failed to prove that she was discriminated against "because of" her sex in violation of Title VII because she did not establish a causal link between Blanch's harassment and Kaylie's employment decisions. We therefore reverse the portion of the district court's judgment that is based on Llampallas' loss of her position as Production Supervisor, and direct the court to enter judgment for Mini-Circuits on remand.[10]

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[10] Both Mini-Circuits and Palmetto also argued in their brief on appeal and at oral argument that same-sex quid pro quo harassment is not cognizable under Title VII. We delayed our decision in this case to await the Supreme Court's decision in *Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 118 S.Ct. 998, 140 L. Ed. 2d 201 (1998)*, addressing the same issue. The Oncale Court held that same-sex harassment is cognizable under Title VII; thus, we dispose of this initial argument by reference to that opinion and to our own opinion in *Fredette v. BVP Management Associates, 112 F.3d 1503 (11th Cir. 1997), cert. denied, -- U.S. --, 118 S.Ct. 1184, 140 L.Ed.2d 315 (1998). See also infra* part II.C. (explaining that same-sex sexual harassment can give rise to the same inference of impermissible discriminatory animus as does different-sex sexual harassment, depending on the sexual preference of the harasser).

II.

In part II.C, we conclude that Llampallas cannot succeed on the merits of any Title VII claim because she failed to prove that she suffered discrimination "because of" her sex. Thus, if the first two claims presented - that Palmetto was not an "employer" and that Llampallas was not an "employee" - bear on the merits of the case as well, we need not spend time assessing those claims. In *McKenzie v. Davenport-Harris Funeral Home,* 834 F.2d 930, 931-32 (11th Cir. 1987), however, we implied that the issue of who is an "employer" (and, concomitantly, the issue of who is an "employee") under Title VII bears on subject matter jurisdiction. *See also Lyes v. City of Riviera Beach,* 126 F.3d 1380, 1384 (11th Cir. 1997), reh'g granted & op. vacated, 136 F.3d 1295 (1998) ("The existence of a Title VII 'employer' is a jurisdictional prerequisite to suit under the statute." (citing *Virgo v. Riviera Beach Assocs., Ltd.,* 30 F.3d 1350, 1359 (11th Cir. 1994) (citing *McKenzie*))); *Rogero v. Noone,* 704 F.2d 518, 520 (11th Cir. 1983)(referring to the "jurisdictional requirement of numerosity" included as part of the definition of "employer" under the statute). Although we question whether this implication is correct under *Bell v. Hood,* 327 U.S. 678, 66 S.Ct. 773, 90 L. Ed. 939 (1946)(explaining the difference between a challenge brought on jurisdictional grounds and a challenge brought on the merits for failure to state a claim); *see also Garcia v. Copenhaver, Bell & Assocs.,* 104 F.3d 1256, 1261-66 (11th Cir. 1997)(discussing the definition of "employer" and "employee" under the Age Discrimination in Employment Act ("ADEA") as both a jurisdictional issue and an issue bearing on the merits of the case), we believe *McKenzie* is binding precedent. We therefore treat both definitional claims as jurisdictional ones and address them before reaching the merits of the case. In part II.A, we assess

the appellants' claim that Llampallas was not an "employee" in her position as officer-director at Palmetto. In part II.B, we assess the appellants' claim that Palmetto was not an "employer" under Title VII.

A.

Title VII prohibits discrimination against "any individual" with regard to that individual's terms and conditions of employment or application for employment. *See 42 U.S.C. § 2000e-2*(a) (1994). The statute does not define "any individual," and although we could read the term literally, we have held that only those plaintiffs who are "employees" may bring a Title VII suit. *See McClure v. Salvation Army,* 460 F.2d 553, 556 (5th Cir. 1972) (stating that "if the provisions of Title VII are to apply to the relationship between [the defendant] and [the plaintiff,] it is necessary that [the defendant] be an 'employer' engaged in an 'industry affecting commerce' and that [the plaintiff] be an 'employee' as those terms are defined" in the Act);[11] *Serapion v. Martinez,* 119 F.3d 982, 985 (1st Cir. 1997)("Although the language [of Title VII] speaks of 'any individual,' courts long ago concluded that Title VII is directed at, and only protects, employees and potential employees."); *Alexander v. Rush N. Shore Med. Ctr.,* 101 F.3d 487, 491 (7th Cir. 1996), *cert. denied,* - - U.S. - -, 118 S.Ct. 54, 139 L. Ed. 2d 19 (1997) (overruling previous case refusing to "restrict[] the Act's protection to only former, present, and potential employees"); *Hyland v. New Haven Radiology Assocs.,* 794 F.2d 793, 796 (2d Cir. 1986)(interpreting identical "any individual" language in the ADEA) to provide coverage "solely

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[11] In *Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc)*, this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

in favor of a person who is an employee"); *but see Sibley Mem. Hosp. v. Wilson,* 160 U.S. App. D.C. 14, 488 F.2d 1338, 1341 (D.C.Cir. 1973) ("any individual" not limited to "employees"); *but cf. Gomez v. Alexian Bros. Hosp. of San Jose,* 698 F.2d 1019, 1021 (9th Cir. 1983) (recognizing suit for discriminatory failure to hire when the defendant employer failed to hire another corporation as an independent contractor and a potential employee of the rejected corporation brought suit directly against the defendant employer).

This limitation is necessary to further Congress' intent in enacting Title VII. "Title VII does not presume to obliterate all manner of inequity." *Keyes v. Secretary of the Navy,* 853 F.2d 1016, 1026 (1st Cir. 1988). Instead, Congress intended to limit the scope of the Act to specific employment relationships; thus, the statute provides relief only against "employers" as defined under the statute. We can assume that Congress also meant to limit the pool of potential plaintiffs under Title VII; otherwise, any person could sue an "employer" under the statute regardless of whether she actually had an employment relationship with that employer. Hence, courts have almost universally held that the scope of the term "any individual" is limited to employees.

Title VII's remedial scheme also supports this interpretation; the statute authorizes remedies such as reinstatement, hiring, and back pay that could not make a non-employee plaintiff whole. Moreover, in 1972, Congress extended the reach of Title VII to the federal workplace, amending the Act to cover "all personnel actions affecting *employees or applicants for employment* . . . ." Pub. L. No. 92-261, § 717, 86 Stat. 103, 111 (1972) (codified at *42 U.S.C. § 2000e-16*(a) (1994)) (emphasis added). Because Congress intended, by this amendment, to make Title VII applicable in

the federal workplace to the same extent that it was already applicable in the non-federal workplace, *see* H.R. Rep. No. 92-238 (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2159-60, the amendment supports the interpretation of "any individual" in the original Act as limited to those individuals who are employees.

Title VII includes a definition of the term "employee": "an individual employed by an employer." *See 42 U.S.C. § 2000e*(f) (1994).[12] This definition does not get us very far. We believe, however, that only individuals who receive compensation from an employer can be deemed "employees" under the statute. *See O'Connor v. Davis,* 126 F.3d 112, 115-16 (2nd Cir. 1997), *cert. denied,* -- U.S. --, 118 S.Ct. 1048, 140 L. Ed. 2d 112 (1998) ("Where no financial benefit is obtained by the purported employee from the employer, no plausible employment relationship of any sort can be said to exist because . . . compensation . . . is an essential condition to the existence of an employer-employee relationship." (internal quotations and citations omitted)); *see also Haavistola v. Community Fire Co.,* 6 F.3d 211, 221-22 (4th Cir. 1993) (reversing a grant of summary judgment for employer because question of whether benefits provided to plaintiff were sufficient "compensation" to render plaintiff an employee was one of disputed fact); *cf. McClure,* 460 F.2d at 557 (holding

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[12] This definition is included to define the term "employer" under the statute. Title VII limits those who can be sued under the statute to "employers." *See infra* part II.B. An "employer" is defined as "a person . . . who has fifteen or more employees." 42 U.S.C. § 2000e(b) (1994). Thus, section 2000e(f) might not bear upon the definition of employee for purposes of determining who is an "individual" who can sue under the statute. Because the statutory definition of "employee" really provides no guidance to interpreting the term, however, this concern does not affect our analysis.

that an individual who was "selected, employed, controlled, trained, *and paid*" by the employer was an employee (emphasis added)). Congress did not intend Title VII to protect mere titles or labels; an individual who sues only to maintain a purely gratuitous working relationship does so without the protection of that statute. Thus, because the record establishes that Llampallas received no compensation as an officer-director of Palmetto,[13] she cannot be considered an "employee" of Palmetto for Title VII jurisdictional purposes.[14]

In sum, the district court had no jurisdiction to assess the merits of Llampallas' Title VII claim to the extent it was based on the loss of her position as officer-director of Palmetto. We therefore vacate the portion of the district court's judgment addressing that loss.

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[13] Because the designation of a plaintiff as an employee "must turn on the facts of a particular case," *Fountain v. Metcalf, Zima & Co., P.A.*, 925 F.2d 1398, 1400 (11th Cir. 1991) (distinguishing a partner in an accounting firm from an employee under the ADEA) (citation omitted), and because the district court made no findings pertaining to Llampallas' status as an employee, we must peruse the record ourselves.

[14] Llampallas received no salary or wages for her position. She did introduce into evidence a check for $1,000.00, issued by Palmetto, that reads "directory's [*sic*] fee," which she claims establishes she was paid for her services at Palmetto. We note that the phrase "directory's fee" is written in a different hand than the rest of the check. We also note that under Palmetto's by-laws, "no compensation shall be paid to Directors or Officers for their services as Directors or Officers," and that Llampallas reported the $1,000.00 as "nonemployee compensation" for income tax purposes. In light of this information, we find that the $1,000.00 was not compensation sufficient to establish employee status.

B.

Although Title VII does not on its face define who can sue under the statute, it does clearly define who can be sued. A plaintiff may bring a Title VII action against any "employer," defined as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . ." *42 U.S.C. § 2000e*(b). It is undisputed that Palmetto does not employ fifteen employees. Llampallas, however, argued at trial that Mini-Circuits and Palmetto should be considered as a "single employer" under Title VII such that the employees of both companies count toward the fifteen-employee jurisdictional requirement. The district court agreed, applying the four-part test developed in *Radio and Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 85 S.Ct. 876, 13 L. Ed. 2d 789 (1965) (holding that two entities were a single employer and therefore that their gross receipts could be totaled together to establish jurisdiction under the National Labor Relations Act), to hold that Mini-Circuits and Palmetto were a "single integrated enterprise" so that the two entities could be considered one employer for jurisdictional purposes. Because Palmetto and Mini-Circuits together employ more than fifteen employees, the court then held Palmetto jointly liable with Mini-Circuits for the loss of both Llampallas' position at Mini-Circuits and her position at Palmetto. We review the district court's decision to hold Palmetto liable under Title VII *de novo*. Because we have already determined that neither entity can be held liable for the loss of Llampallas' position as officer-director of Palmetto, *see supra* part II.A., we confine our discussion to Palmetto's responsibility for Llampallas' loss of her position at Mini-Circuits.

Regardless of whether we address Palmetto's status under the "single employer" theory of jurisdiction, *see McKenzie*, 834 F.2d at 933 n.3 (adopting the *Radio and Television* test for Title VII purposes), or a "joint employer" theory of liability, *see Virgo v. Riviera Beach Assocs., Ltd.*, 30 F.3d 1350, 1359-61 (11th Cir. 1994), Palmetto cannot be held liable under Title VII for firing Llampallas from her position as Production Supervisor at Mini-Circuits. Both theories concentrate on the degree of control an entity has over the adverse employment decision on which the Title VII suit is based. *See, e.g., Fike v. Gold Kist, Inc.*, 514 F. Supp. 722, 725-26 (N.D. Ala. 1981), *aff'd* 664 F.2d 295 (11th Cir. 1982) (single employer); *Swallows v. Barnes & Noble Book Stores, Inc.*, 128 F.3d 990, 993 n.4 (6th Cir. 1997) (explaining the differences between the joint employer theory and the single employer theory); *Schweitzer v. Advanced Telemarketing Corp.*, 104 F.3d 761, 763-64 (5th Cir. 1997)(single employer); *Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1241 (2d Cir. 1995) (single employer). In this case, that adverse employment decision was Llampallas' termination from her position as Production Supervisor at Mini-Circuits, and Palmetto had absolutely nothing to do with that decision. Palmetto had no interaction with Mini-Circuits employees. It made no decisions that affected the terms and conditions of employment at Mini-Circuits. In fact, it was completely uninvolved in the operation of Mini-Circuits.[15] We therefore vacate the portion of the

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[15] The district court did make a finding that Palmetto and Mini-Circuits were operated "for a common business purpose, i.e., the manufacture and sale of electrical assemblies." This finding goes to the "interrelationship of operations" prong of the *McKenzie* test for "single employers."

After examining the record, however, we hold that this finding is clearly erroneous. It is undisputed that Mini-Circuits, a member of Palmetto, manufactured and sold electrical assemblies; there is no support,

district court's judgment holding Palmetto responsible for the loss of Llampallas' position at Mini-Circuits and remand with directions that the district court dismiss Palmetto from this suit for lack of jurisdiction.

C.

The only claim over which the district court had jurisdiction, therefore, was Llampallas' claim against Mini-Circuits for the loss of her position as Production Supervisor. We now address the merits of this claim.

The district court concluded that Mini-Circuits was liable to Llampallas under *42 U.S.C. § 2000e-2*(a)(1) (1994), which states:

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however, for a finding that *Palmetto* manufactured or sold electrical assemblies. Palmetto's by-laws state that the corporation was "organized for the purpose of being a condominium association . . . and in turn for the purpose of operating, governing, administering and managing the property and affairs of PALMETTO EXTRA, a commercial condominium . . . ." There is nothing in the record to suggest that Palmetto was operated in violation of its by-laws, or that Palmetto was operated as anything but a non-profit association of condominium owners.

The district court apparently reasoned that because Mini-Circuits was a member of Palmetto and rented space in the Palmetto-managed condominium, Palmetto itself furthered the business of Mini-Circuits, whatever that business may have been. An association, however, does not engage in the business of its member corporations simply because those member corporations belong to the association. (Even if the law were otherwise, the district court would have had to find that Palmetto was operated for the business purposes of all of its members, including Irest Corporation. The district court made no findings concerning Irest.) To conclude otherwise would render every association, whether a management, trade, or professional association, liable for the conduct of every one of its members simply by virtue of their association.

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

To succeed in proving intentional discrimination under this section, therefore, a plaintiff must establish, by a preponderance of the evidence: (1) a discriminatory animus towards him (*i.e.*, an attitude towards the plaintiff held because of one of the listed characteristics), *see International Bhd. of Teamsters v. United States,* 431 U.S. 324, 335 n.15, 97 S.Ct. 1843, 1854 n.15, 52 L. Ed. 2d 396 (1977)(stating that in disparate treatment cases, "proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment"),[16] (2) an alteration in the terms and conditions of his employment by the employer, and (3) a causal link between the two. *Cf. Olmsted v. Taco Bell Corp.,* 141 F.3d 1457, 1460 (11th Cir. 1998) (establishing the elements for a prima facie case under § 2000e-3(a) (1994), which prohibits adverse employment action because of the plaintiff's conduct instead of adverse employment action because of the plaintiff's characteristics). We interpret the claim of error before us as an assertion that the district court erred in holding Mini-Circuits liable for violating this section because

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[16] In this opinion we address only "disparate treatment" claims, as opposed to "disparate impact" claims.

Llampallas failed to prove the third element of her claim.[17] In other words, assuming that the district court was correct in finding that Blanch harbored a discriminatory animus towards Llampallas, and that Mini-Circuits terminated Llampallas' employment, Mini-Circuits argues that Llampallas failed to establish a causal link between the two events. We agree.

It is an extraordinary case in which a defendant employer admits it has taken an adverse employment action against a plaintiff employee "because of" the employee's sex.[18] Thus, courts must rely on inferences drawn from the observable facts to determine whether a Title VII violation has occurred. If an employee of the defendant has "sexually harassed" the plaintiff, and the harassing employee then takes a "tangible

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[17] Mini-Circuits argues that the district court "should either have concluded that no *quid pro quo* harassment was proven here, or that the rule of strict liability, applied in more typical *quid pro quo* cases did not apply." The Supreme Court, however, recently made clear that "the labels *quid pro quo* and hostile work environment are not controlling for purposes of establishing employer liability." *Burlington Indus.*, 524 U.S. at - - , 118 S.Ct. at 2271. In this case, Mini-Circuits' use of the term "*quid pro quo*" only causes confusion, because Mini-Circuits attempts to use the term to invoke rules developed in earlier cases that do not apply to the unique set of facts surrounding Llampallas' situation. We therefore disregard the parties' labels and proceed from the statute itself.

[18] We do not address Title VII claims based on an alleged alteration in the terms and conditions of the plaintiff's employment that does not rise to the level of a "tangible employment action" because Llampallas brought her complaint based solely upon Mini-Circuits termination of her employment, the classic and ultimate "tangible employment action." Even if Llampallas had alleged the existence of an "abusive working environment" as the necessary alteration, *see infra* note 28, we believe that the actions of Mini-Circuits and of Llampallas would be sufficient to afford Mini-Circuits an affirmative defense to liability under Title VII. *See infra* note 32.

employment action" against the plaintiff, the plaintiff may take advantage of a chain of inferences to establish, based on those facts alone, all three elements of her Title VII claim.

First, in such a situation, the act of sexual harassment itself creates an inference that the harasser harbors a sexually discriminatory animus towards the plaintiff. When a person "sexually harasses" another, i.e., makes comments or advances of an erotic or sexual nature, we infer that "the harasser [is making] advances towards the victim because the victim is a member of the gender the harasser prefers." *Fredette v. BVP Management Assocs.*, 112 F.3d 1503, 1505 (11th Cir. 1997), *cert. denied*, -- U.S. --, 118 S.Ct. 1184, 140 L. Ed. 2d 315 (1998). Unless there is evidence to the contrary, therefore, we also infer that the harasser treats members of the "non-preferred" gender differently - and thus that the harasser harbors an impermissible discriminatory animus towards persons of the preferred gender. *See Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) ("In the typical case in which a male supervisor makes sexual overtures to a female worker, it is obvious that the supervisor did not treat male employees in a similar fashion."). This inference can be drawn regardless of the sexual orientation of the harasser, so long as the harassed victim is of the harasser's "preferred" gender. As the Supreme Court explained in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, --, 118 S.Ct. 998, 1002, 140 L. Ed. 2d 201 (1998),

> Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals

> would not have been made to someone of the same sex. The same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual.

Second, a tangible employment action - e.g., demotion or discharge, *see Burlington Indus., Inc. v. Ellerth,* 524 U.S. --, --, 118 S.Ct. 2257, 2268, 141 L. Ed. 2d 633 (1998) - is clearly an alteration in the terms and conditions of the plaintiff's employment.[19] Moreover, that action will be imputed to the employer. Because an employee who is able to take such an action necessarily "has been empowered by the company as a distinct class of agent" to make that decision, and because the decision is "the means by which [the agent employee][20] brings

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[19] Occasionally, a court implies that sexually harassing conduct itself violates Title VII. Sexually demeaning behavior, however, is merely evidence of a discriminatory animus, and Title VII does not punish the existence of a discriminatory animus. It is only when that animus causes an alteration in the terms and conditions of the plaintiff's employment that the employer will be held liable to the plaintiff under the statute. A Title VII plaintiff may establish such an alteration by showing either 1) a tangible employment action, which "itself constitutes a change in the terms and conditions of employment," *see Burlington Indus.*, 524 U.S. at --, 118 S.Ct. at 2265, or 2) the existence of an "abusive working environment," which courts recognize as synonymous with a "constructive" alteration in the terms and conditions of the plaintiff's employment. *See Burlington Indus.*, 524 U.S. at --, 118 S.Ct. at 2264; *Faragher v. City of Boca Raton,* 524 U.S. --, --, 118 S.Ct. 2275, 2283, 141 L. Ed. 2d 662 (1998).

[20] We have replaced the Supreme Court's term "supervisor" with the broader term "employee." The label placed on the employee who takes a tangible employment action against the plaintiff is irrelevant because it is the employee's ability to take the action that identifies the employee as the employer's "agent" and imputes liability to the employer under Title VII. To take an adverse employment action of the type that triggers Title VII, an

the official power of the [employer] to bear" on the plaintiff, "a tangible employment action taken by the [employee] becomes for Title VII purposes the act of the employer." *Burlington Indus.*, 524 U.S. at --, 118 S.Ct. at 2269. Thus, the plaintiff has satisfied the second element of her case: an alteration in the terms and conditions of her employment by the employer.

Third, the fact that the harasser was the decisionmaker for the tangible employment action gives rise to an inference that the harasser's discriminatory animus motivated that action. We assume that the harasser, because she harbors a discriminatory animus towards the plaintiff, could not act as an objective, non-discriminatory decisionmaker with respect to the plaintiff. Thus, any time the harasser makes a tangible employment decision that adversely affects the plaintiff, an inference arises that there is a causal link between the harasser's discriminatory animus and the employment decision. A Title VII plaintiff, therefore, may establish her entire case simply by showing that she was sexually harassed by a fellow employee, and that the harasser took a tangible employment action against her.

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employee *must* be the employer's agent. Although the employer may argue that the employee had no actual authority to take the employment action against the plaintiff, apparent authority serves just as well to impute liability to the employer for the employee's action. *See Gay v. Board of Trustees of San Jacinto College, 608 F.2d 127, 128 (5th Cir. 1979)* (rejecting a defense of no authority because the employer "held out the supervisor as a person having authority over those under his supervision, and the plaintiff perceived him to have authority to discharge her"). The term "supervisor," therefore, is rather superfluous when the plaintiff brings suit based on a tangible employment action. If an employee takes a tangible employment action against the plaintiff, the employer will held liable under Title VII for that action (if the action otherwise violates the statute), regardless of whether the employee taking the action is labeled the plaintiff's "supervisor."

In this case, the district court found that Blanch and Llampallas were both lesbians, and that Blanch sexually harassed Llampallas. Because nothing in the record suggests that Blanch sexually harassed anyone other than Llampallas, therefore, we infer a discriminatory animus by Blanch towards Llampallas based on Llampallas' sex. We also know that a tangible employment action was taken against Llampallas - termination of her employment by Mini-Circuits. Thus, we assume that if that action was taken "because of" Llampallas' sex, Mini-Circuits will be held liable. Blanch, however, did not herself make the decision to terminate Llampallas' employment; Kaylie did.[21] Although this fact is not fatal to Llampallas' claim, *see e.g., Sparks v. Pilot Freight Carriers, Inc.,* 830 F.2d 1554, 1565 (11th Cir. 1987) (reversing district court's grant of summary judgment for the employer because an issue of material fact remained as to whether the alleged harasser "influenced" the decisionmaker to fire the plaintiff), she cannot benefit from the inference of causation arising from the common identity of a harasser and a decisionmaker. Instead, Llampallas had the burden to prove at trial that Blanch's discriminatory animus caused Kaylie to terminate her employment with Mini-Circuits. We believe that she failed to do so.

The district court found that Llampallas had established causation, stating that Mini-Circuits could be held liable for Blanch's harassment because "Blanch made good on her threat [to fire Llampallas] and got Llampallas fired." The court's own

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[21] Indeed, the district court made no findings regarding Blanch's authority to fire Llampallas. The record, however, reflects that Kaylie first asked Blanch to fire Llampallas, which she refused to do. We assume, therefore, that Blanch had the authority to fire Llampallas herself. This assumption does not affect the outcome of this case.

findings, however, belie a determination that the causal link lay between Blanch's sexually discriminatory animus towards Llampallas and Llampallas' discharge.

The court made the following factual findings concerning Blanch's role in Llampallas' discharge:

> On May 23, 1991, Blanch called Kaylie in New York and informed him that she was resigning because she could no longer work with Llampallas. Kaylie told her not to do that. He immediately told Llampallas to come to New York to see him.
>
> Llampallas went to New York around May 24, 1991, to meet with Kaylie. After the meeting, Kaylie placed Llampallas on suspension, effective May 27, 1991, for six to eight weeks at her full pay . . . .
>
> . . .
>
> On November 8, 1991, Kaylie informed Llampallas that he was not going to open the new facility [which she was to manage] and that he was terminating her from her employment with Mini-Circuits.

Record, vol. 4, n. 124, at paras. 24-25 & 27 (ord.). The court then explained its reasoning behind its finding that Blanch "got Llampallas fired":

> Due to the fact that Blanch could not work with Llampallas once they were no longer lovers, Blanch telephoned Kaylie in May of 1991 telling him she was quitting because of

> Llampallas. This, in effect, forced Kaylie to choose between the two women. He put Llampallas on suspension while he tried to find another facility for Llampallas (although her work performance was allegedly declining) and once that fell through, he had no choice but to terminate Llampallas.

Record, vol. 4, n. 124, at para. 48.

The district court found, therefore, that when Kaylie terminated Llampallas' employment, he did so *because he wished to retain Blanch*. Title VII does not prohibit an employer from discharging an employee because it wishes to retain another, presumably more valuable, employee - unless, of course, the desired employee is of a different sex from the plaintiff, and the decision can be linked to a discriminatory animus towards persons of the non-desired employee's sex. Here, Llampallas and Blanch are both women; thus, the fact that Kaylie chose Blanch over Llampallas cannot give rise to an ultimate inference that Kaylie choose Blanch "because of" Llampallas' sex. The district court's findings, therefore, do not support its conclusion that because Blanch "got Llampallas fired," Mini-Circuits can be held liable for Llampallas' discharge under Title VII.[22] We look to the record to determine

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[22] We recognize that Mini-Circuits also claimed at trial that it had discharged Llampallas for legitimate nondiscriminatory reasons unrelated to its desire to retain Blanch as an employee. The district court specifically found that these other reasons were wholly non-credible. That finding, however, does not translate into a finding that Mini-Circuits fired Llampallas "because of" her sex.

As mentioned *supra*, the district court apparently found that Mini-Circuits' "true reason" for firing Llampallas was its desire to retain Blanch. This is a legitimate, nondiscriminatory reason. Moreover, we conclude that

whether there is any evidence to support an inference of a causal link between Blanch's discriminatory animus and the decision to terminate Llampallas' employment. If not, we must disregard the court's ultimate finding of intentional discrimination based on that inference as clearly erroneous.

Several courts have held that even when the harasser in a Title VII case is not the decisionmaker, if the plaintiff shows that the harasser employed the decisionmaker as her "cat's paw" - i.e., the decisionmaker acted in accordance with the harasser's decision without herself evaluating the employee's situation, *see Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) - causation is established. *See, e.g., Long v. Eastfield College*, 88 F.3d 300, 307 (5th Cir. 1996) ("If . . . [the decisionmaker] did not conduct his own independent investigation, and instead merely 'rubber stamped' the recommendations of [those who held a discriminatory animus], the causal link between [the plaintiffs'] protected activities and their subsequent termination, would remain intact."). In a cat's paw situation, the harasser clearly causes the tangible employment action, regardless of which individual actually signs the employee's walking papers. *See Shager*, 913 F.2d at 405 (stating that in such a situation "the [decisionmaker] would no more be a nonconductor [for discriminatory animus] . . . than would be the secretary who typed [the plaintiff's] discharge papers knowing nothing of the [] discrimination that lay behind the discharge"); *Burlington Indus.*, 524 U.S. at --, 118 S.Ct. at 2269. In effect, the harasser *is* the decisionmaker, and the titular "decisionmaker" is a mere conduit for the harasser's discriminatory animus.

Mini-Circuits' reasonable attempt to investigate the circumstances surrounding Blanch's threat, *see* discussion *infra*, negates any inference of discrimination that could be drawn from Mini-Circuits' false proffer.

This, however, is not a cat's paw case. Kaylie's decision to suspend and discharge Llampallas was not simply a tacit approval of Blanch's own decision to do the same. Blanch communicated no adverse employment decision regarding Llampallas to Kaylie for his review; nor did she recommend that Kaylie take action against Llampallas. The only "decision" Blanch made was to quit Mini-Circuits because she "couldn't work with [Llampallas] anymore." We recognize that Blanch's threat to quit was probably part of a scheme to manipulate the company into firing Llampallas because of her sex - Blanch made a "fake" threat knowing that Kaylie would choose her over Llampallas. We do not, however, need to decide whether Mini-Circuits could be held liable based on Kaylie's unwitting compliance in Blanch's manipulative plan, because such is not the case before us.

When Kaylie received Blanch's phone call, he did not take action against Llampallas based on that threat. Instead, he summoned Llampallas to New York to investigate the situation. Kaylie afforded Llampallas a private audience of several hours, and gave her the opportunity to explain the situation at Hialeah. During that conversation, Llampallas informed Kaylie neither of her sexual relationship with Blanch, nor of the developments upon the demise of that relationship. According to both Llampallas' and Kaylie's testimony, the conversation revolved around Llampallas' work habits and whether Llampallas would be able to run a new Mini-Circuits office away from Blanch. This meeting suffices to except this case from the cat's paw line of cases. *See Willis v. Marion County Auditor's Office,* 118 F.3d 542, 547 (7th Cir. 1997) (excepting from the "cat's paw" line a case in which the decisionmaker investigated a subordinate's motives by meeting with the plaintiff before acting on the subordinate's adverse recommendations).

Moreover, we believe that the behavior of both Kaylie and Llampallas during their meeting negates any remaining inference of causation between Blanch's discriminatory animus and Kaylie's termination of Llampallas' employment. The Supreme Court recently declared that an employer's Title VII liability for its employees' actions is circumscribed not only by agency principles, but by the employer's own efforts to prevent Title VII violations in its workplace and swiftly to remedy such violations if they do take place. *See Burlington Indus.*, 524 U.S. at - - , 118 S.Ct. at 2270. If those efforts are reasonable - i.e., if the employer behaved reasonably in attempting to ferret out and eliminate sexual harassment among its employees that could lead to adverse employment consequences for the harasser's victims - the Court declared, a reviewing court should take those efforts into consideration when assessing the employer's liability stemming from any undiscovered harassment. *See id.* at --, 118 S.Ct. at 2270-71. Further, the Court stated that the avoidable consequences doctrine applied in tort law to limit a defendant's liability is applicable to Title VII. *See id.* at --, 118 S.Ct. at 2270.[23]

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[23] We note that the Court in *Burlington Industries* applied these principles to formulate an "affirmative defense" available to an employer who is sued under Title VII in certain circumstances. The Court specifically stated that "no affirmative defense is available, however, when [a] supervisor's harassment culminates in a tangible employment action, such as discharge, demotion or undesirable reassignment." *See Burlington Indus.*, 524 U.S. at --, 118 S.Ct. at 2270. We conclude that this dicta does not prevent us from considering Mini-Circuits' and Llampallas' actions following Blanch's threat for two reasons. First, although the Court's use of the term "culminates" may appear to draw within the ambit of the exception all those situations in which the harasser's sexually discriminatory animus is a "but for" cause of the tangible employment action, we believe that the Court meant to limit the exception to those cases in which the harasser acts as the decisionmaker with respect to the action, either in actuality or by using another as a "cat's paw." *See id. at --, 118 S. Ct at 2269-71*. Thus, the

Applying these principles to Llampallas' case, we believe that Mini-Circuits, through Kaylie, "broke the chain" of causation between Blanch's harassment and its decision to terminate Llampallas' employment both because it behaved reasonably in response to Blanch's threat to quit, and because Llampallas herself failed to avoid the consequences of that threat. When Kaylie called Llampallas to New York he did not know, nor could any reasonable person know, that Blanch's threat was motivated by a discriminatory animus towards Llampallas. Thus, Kaylie was not "on notice" that Blanch could be scheming against Llampallas based on Llampallas' sex. Llampallas, although she had the opportunity to do so, failed to inform Kaylie of her relationship with Blanch and of the information she possessed that would have put Kaylie on notice that Blanch's threat may have been motivated by a discriminatory animus.

We hesitate to require an employer to investigate - as Mini-Circuits did - every action of its employees that could be motivated by a discriminatory animus. When the employer makes an effort to determine the employee's side of the story before making a tangible employment decision affecting that employee, however, it should not be held liable under Title VII for that decision based only on its employee's hidden

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exception does not apply to cases such as Llampallas' in which the harasser is not the decisionmaker. Second, in this case, we are not considering the actions of Mini-Circuits and Llampallas as part of a possible "affirmative defense" applied after we have determined that Llampallas proved a Title VII violation. Instead, we are applying the *Burlington Industries* Court's articulated policies to determine whether Llampallas even established an element of her case.

discriminatory motives.[24] In this case, Mini-Circuits should not be held liable for discharging Llampallas simply because Blanch harbored a discriminatory animus towards Llampallas. We hold, therefore, that Llampallas failed to provide evidence sufficient to create an inference of causation between Blanch's sexually discriminatory animus towards Llampallas and Kaylie's decision to discharge her on behalf of Mini-Circuits. Any contrary finding by the district court is clearly erroneous.

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[24] Upon examination of the record, we note that Llampallas testified at trial that during her meeting with Kaylie that she told Kaylie the problem between herself and Blanch was "personal," and that Kaylie did not respond to this statement. Further, in a letter that Llampallas wrote to Kaylie following their meeting, and during her suspension, Llampallas again stated that she had a "personal" problem with Blanch. Kaylie also testified that Llampallas may have said something about a "personal" problem during their meeting, but that he "did not want to pry."

We find that these statements, standing alone, are not nearly enough to put Kaylie on notice that Blanch was sexually harassing Llampallas, especially in light of the fact that Kaylie claimed he never knew either Blanch or Llampallas was a lesbian. Even in this day and age, an employer is not expected to assume that two of his female employees have engaged in a sexual relationship. Llampallas' comment that she and Blanch had a "personal" problem, therefore, would not have put a reasonable employer on notice that Blanch and Llampallas were having a sexual relationship, let alone that Blanch was harassing Llampallas. The "personal" problem Llampallas referred to could have been any number of personal problems that did not involve discrimination against Llampallas based on her sex.

We also recognize that the district court found that several employees in the Hialeah facility had witnessed Blanch's harassment of Llampallas. Thus, an issue arises as to whether the harassment was so "severe and pervasive" that we could charge Mini-Circuits with constructive knowledge of Blanch's conduct. We believe, however, that Kaylie's meeting with Llampallas, at which he gave Llampallas an opportunity to provide him with actual knowledge concerning Blanch's motivations, negates any inference that Kaylie had mere constructive knowledge that Blanch was harassing Llampallas based on Llampallas' sex.

Llampallas still could have succeeded on her Title VII claim, of course, if she had presented evidence to support a claim that Kaylie himself harbored a discriminatory animus. She could then take advantage of the inference of causation arising from the fact that Kaylie also fired her.

Kaylie, however, did not sexually harass Llampallas, and Llampallas presented no evidence from which a trier of fact could infer that Kaylie himself harbored a discriminatory animus towards her or towards women in general. Thus, there existed no motivating animus to which Kaylie's termination of Llampallas' employment could be linked, and Llampallas' Title VII claim must fail because she failed to prove she was discriminated against "because of" her sex.

III.

For the foregoing reasons, we VACATE the judgment of the district court in part and REVERSE in part, REMANDING this case for further proceedings consistent herewith.

SO ORDERED.

EDMONDSON, Circuit Judge, concurs in the result.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

ELBA LLAMPALLAS and
SILVIA CABRERA,

Plaintiffs,

Case No.
93-2053-CIV-ATKINS

v.

MINI-CIRCUITS LAB., INC.,
and PALMETTO EXTRA
CONDOMINIUM ASSOCIATION, INC.

Defendants.
_____/

MEMORANDUM OPINION AND ORDER PURSUANT TO RULE 52(A)

THIS CAUSE came before the court for non-jury trial on February 28, 1995, March 1, 2, 3, 13, and 14, 1995 and April 10 and 11, 1995. Elba Llampallas (Llampallas) and Silvia Cabrera (Cabrera) (collectively referred to as plaintiffs), brought this action for violations of Title VII of the Civil Rights Act of 1964, as amended, *42 U.S.C. 2000e,* et seq.

FINDINGS OF FACT

At the trial, the court received documentary and testimonial evidence. The testimonial evidence by the opposing parties was contradictory in every key aspect, requiring the court to make a credibility determination. Upon reviewing the documentary evidence, the court is of the opinion that the

documentary evidence lends credibility to the plaintiff Llampallas' testimony and that of her witnesses. Based on this evidence, the Court makes the following findings of fact:

1. Elba Llampallas

1. Llampallas was born in Cuba on February 14, 1949. She is divorced with two adult sons. She is an admitted lesbian.

2. Marta Blanch (Blanch), the General Manager of defendant Mini-Circuits Lab., Inc. (Mini-Circuits), was born in Cuba on December 18, 1951. She has never been married an is an admitted lesbian.

3. Mini-Circuits is a Florida Corporation with its manufacturing and assembling facility in Hialeah, Florida. It is in the business of assembling and producing electrical and signal processing components, which are then incorporated into larger assemblies by Scientific Components Corporation (Scientific), an affiliated corporation.

4. Scientific owns one hundred percent of the stock of Mini-Circuits and does business under the name Mini-Circuits.

5. Harvey Kaylie (Kaylie), his wife and daughters own the majority of stock in Scientific.

6. Defendant Palmetto Extra-Condominium Association, Inc. (Palmetto) is a Florida Not-For-Profit Corporation which operates, manages, and administers a commercial condominium with seven (7) units. Each condominium owner has one vote.

7. Scientific owns six of the seven condominiums in Palmetto. These six condominiums or warehouses are leased to Mini-Circuits for its receiving, shipping and assembling operations.

8. When the condominium developer released the association to the owners, Scientific elected Kaylie, Llampallas and Blanch to the Board of Directors of Palmetto. The present Board is composed of Kaylie, his daughter and Blanch.

9. Kaylie is President of Scientific, Palmetto and Mini-Circuits and is on the Board of Directors of each of the three corporations. Kaylie, his wife and daughters fill all the officer positions at Scientific and Mini-Circuits as well as constituting the majority of the Board of Directors of Scientific and Mini-Circuits.

10. Kaylie controls Scientific, Mini-Circuits and Palmetto and operates the three corporations for a common business purpose, i.e., the manufacture and sale of electrical assemblies.

11. Llampallas and Blanch met in New Jersey in 1977. When Mini-Circuits opened its plant in Hialeah in 1977, the two women moved to Hialeah, where Mini-Circuits hired Blanch as the General Manager and Llampallas as an assembler.

12. As Mini-Circuits grew and prospered, Blanch continued as the General Manager and Llampallas was promoted to Production Supervisor and second in rank to Blanch in production.

13. During the years 1977 to September 1990, Llampallas and Blanch lived together and had an on-going, consensual sexual relationship. The women also bought a house in their joint names, owned a joint bank account out of which they paid the household expenses, mortgage and other expenses, and they took all of their vacations together.

14. During the years 1977 to September 1990, Blanch told Llampallas that if their relationship terminated, Blanch would see to it that Llampallas would lose her job.

15. In September of 1990, Llampallas told Blanch that she wanted to terminate their sexual relationship, but that she wished to remain friends and continue to share the same home. Nonetheless, Blanch eventually decided to move out of their home.

16. Blanch insisted that Llampallas resume the sexual relations and threatened to have Llampallas fired if she did not resume the sexual relationship.[1]

17. At trial, Blanch's threats to Llampallas were testified to by Llampallas, Miriam Castro (Castro), Cabrera and Isis Barreras (Barreras).

18. Castro, who was a supervisor at Mini-Circuits, testified that she was in Llampallas' office in December of 1990 when Blanch came in. Llampallas and Blanch had a personal

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[1] At trial, Llampallas testified that she yielded to Blanch's threats and had sexual encounters with her on four occasions between September 30, 1990 and the end of the year. However, in light of the fact the Llampallas' complaint as well as her deposition testimony do not refer to any such encounters, the court does not give any credence to this testimony.

conversation, during which Blanch told Llampallas that if she did not resume the relationship, Blanch would have Kaylie discharge her.

19. Cabrera testified that on one occasion she heard Blanch and Llampallas arguing in an office and that she heard Blanch tell Llampallas that she cannot leave her.

20. Barreras, who is Llampallas current lover, testified that Blanch and Mercedes Alfonso[2] telephoned her one evening. In the course of the conversation, Blanch told her to leave Llampallas because Blanch was going to have Kaylie fire her and Llampallas would lose her job and family. Barreras also testified to a meeting at a restaurant in early 1991 between Barreras, Llampallas, Blanch and Mercedes Alfonso. She testified that during the meeting Blanch said she could not work with Llampallas and Kaylie would always prefer Blanch to Llampallas.

21. Based on the above testimony, the court finds that Blanch did threaten to have Llampallas fired if she did not resume the prior relationship.

22. Around March of 1991, Blanch told Llampallas that she wanted to sell her one-half interest in their house. In April, Llampallas obtained a loan from Kaylie so that she could purchase Blanch's interest. The loan was to be repaid without

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[2] Blanch and Mercedes Alfonso share a residence together, but Blanch denied at trial that they have a lesbian relationship.

interest at the rate of $50.00 per week by deduction from her pay check.[3]

23. At the agreed terms, it should take over four and one-half years for Llampallas to repay the loan. Kaylie testified that at the time of the loan, he expected Llampallas would be at Mini-Circuits to pay back the loan according to its terms.

24. On May 23, 1991, Blanch called Kaylie in New York and informed him that she was resigning because she could no longer work with Llampallas. Kaylie told her not to do that. He immediately told Llampallas to come to New York to see him.

25. Llampallas went to New York around May 24, 1991, to meet with Kaylie. After the meeting, Kaylie placed Llampallas on suspension, effective May 27, 1991, for six to eight weeks at her full pay ($1,000/week). Llampallas testified that prior to September 1990, she did not receive any criticism, verbal or written, from Kaylie about her performance. Blanch also testified on cross-examination that Llampallas never received written criticism of her work prior to May 24, 1991.

26. During the period of suspension, Kaylie told Llampallas that he was contemplating opening another facility with about 10-12 people and that she would be Production Supervisor. He told her to search for a suitable space to lease or purchase. She also took a training course in New York in production equipment it was contemplated she would be using in the new facility.

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[3] The weekly deduction was taken from Llampallas' pay check from April 12, 1991 to November 15, 1991, for a total of $1,600.00.

27. On November 8, 1991, Kaylie informed Llampallas that he was not going to open the new facility and that he was terminating her from her employment with Mini-Circuits.

28. At trial and before the EEOC, Kaylie took the position that Mini-Circuits suspended and terminated Llampallas because she refused to go along with the new management-employee relations program that Kaylie started instituting at Mini-Circuits in 1989. Kaylie's position was that Llampallas' performance since 1989 had been unacceptable and that, despite efforts to persuade her to follow the new program, she refused and was hindering the implementation of the program. The court finds that the documentary evidence is contrary to this position.

29. Kaylie testified that one of the key aspects of this new program which he had been trying to implement since 1989 was that the employees were no longer to be called "employees" but rather "members." On May 24, 1991, Kaylie sent a memo to Blanch for her review, which was to inform the "employees" of the new change in terminology and policy (See Plaintiffs' Exhibit 35). While no documentary evidence was introduced as to when the memo was actually issued to the employees, it is clear that it was not drafted until the day of Kaylie's meeting with Llampallas in New York. Further proof of this comes from Kaylie's July 24, 1995 deposition, in which he testified that in May of 1991 Blanch implemented the team concept he sent her and Llampallas to Israel in 1989 to observe. (See 7/24/95 Kaylie Deposition, page 53, lines 22-23).

30. Additionally, there was a form entitled "Quality Excellence," or "C.D. en Calidad" in its Spanish version, which all members were to sign as indicating their agreement to the

principles set out in it. Two examples of the form were introduced into evidence at trial, both of which where signed on August 8, 1992 (See Plaintiffs' Exhibits 24 and 48). Castillo, who is a Group Leader, testified that she signed her form on August 18, 1992 and that the form was issued to employees under her supervision after that date. No documentary evidence was introduced to rebut the conclusion that the members signed these forms acknowledging this new policy subsequent to Llampallas' suspension.

31. A May 28, 1991 agenda of a meeting held with the Group Leaders was also introduced as evidence at the trial (See Plaintiffs' Exhibit 33). The agenda shows that the subject of the meeting was the 'Restructure of Company.' A second agenda, dated June 4, 1991, was also introduced. The subject covered at this meeting was 'Responsibilities and Objective of Group Leaders.' (See Plaintiffs' Exhibit 34).

32. On June 11, 1991, Blanch wrote a letter to Llampallas in response to a letter Llampallas had written her. In the June 11, 1991 letter, Blanch discusses the changes being made "in accordance with the *new approach* Mr. Kaylie is taking toward the entire [Mini-Circuits] organization." (See Plaintiffs' Exhibit 6) (emphasis added).

33. Also introduced at trial was a magazine article describing changes made by Kaylie to improve quality at Mini-Circuits starting in 1989. (See Plaintiffs' Exhibit 1). However, Kaylie and Blanch's testimony established that Kaylie instituted these programs in the New York facilities of Scientific, not in the Miami facilities of Mini-Circuits.

34. A Summary of Raises and Bonuses Paid Llampallas and Blanch between 1989-1991 was introduced at

trial (See Plaintiffs' Exhibit 59). This salary history shows that in 1988, Llampallas earned $57,822.00, including a $2,500.00 bonus in June, a $4.25/hour raise in July and a $4,000.00 bonus in July. In 1989, Llampallas earned $78,816.00, with a $2,500.00 bonus in June, a $3.00/hour raise in July and a $8,000.00 bonus in December. In 1990, Llampallas earned $82,729.00, including a $9,000 bonus in July, a $3.50/hour raise in July and a $10,000 bonus in December.

35. The court finds that this salary history establishes that Mini-Circuits and Kaylie regarded Llampallas as a good employee throughout 1989 and 1990. While Kaylie testified that his decision on raises is based predominantly on the performance of the company as a whole, he also stated at his July 24, 1995 deposition that if an employee had bad performance, it would influence his decision on raises (See 7/24/95 Kaylie Deposition, page 91, lines 16-19). The court also finds that the documentary evidence establishes that the policies and organization that Mini-Circuits claims Llampallas refused to follow and implement were not actually instituted until well after her suspension.[4]

36. Kaylie testified that another reason for suspending, and eventually terminating Llampallas was because she could not work with the supervisors. Several supervisors who worked with Llampallas testified that she generally had a bad attitude, she used vulgar language with them, was always criticizing them about their work and refused

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[4] Kaylie and Blanch also testified that Llampallas never conducted meetings with the supervisors on quality and that this was another method by which she was blocking the implementation of the new policies. The court finds that the evidence shows that Llampallas in fact conducted meetings with the supervisors at the close of each day in which she discussed problems and quality.

to pay them overtime for the daily afternoon meetings. Many of these supervisors also testified that they never complained to Blanch or Kaylie about this behavior out of their fear that Llampallas would have them lose their job. As such, the court finds that Kaylie could not have known about this behavior at the time he made his decision to suspend and terminate Llampallas.[5] Therefore, the court rejects this testimony.

37. With respect to defendant Palmetto, the court finds that Llampallas was a member of the Board of Directors and a Vice-President until she was terminated from those positions in January of 1992. This termination was a direct result of her discharge from her employment with Mini-Circuits.

2. Silvia Cabrera

38. Mini-Circuits employed Cabrera from August 1984 until her discharge in February of 1992. At the time of the discharge, Cabrera was Quality Control Supervisor.

39. Cabrera testified that she and Llampallas were good friend and that she was friendly with Blanch. She testified that she received no complaints about her work prior to Llampallas' suspension.

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[5] This finding is pursuant to *McKennon v. Nashville Banner Publishing Co., 130 L. Ed. 2d 852, 115 S. Ct. 879 (1995)*, where the Court held that when an employer relies on after-acquired evidence of a wrongdoing as a reason for discharging an employee, the employer must show that had he/she known of the wrongdoing at the time of the discharge, the employee would have been terminated solely on that basis. The defendants did not introduce any evidence to that effect.

40. Cabrera testified that at some point before Blanch moved out of the house she owned with Llampallas, Cabrera overheard a conversation between the two women in which Blanch told Llampallas she cannot leave her. She testified that after this incident and after Blanch moved out of the house, Blanch's attitude towards Cabrera changed and Blanch became very critical of Cabrera's work performance.

41. Cabrera testified that she was discharged because she had witnessed Blanch's threats, because she was a good friend of Llampallas and in retaliation for Llampallas' refusal to resume a sexual relationship with Blanch.

42. Defendants' witnesses testified that Mini-Circuits discharged Cabrera because her work performance was declining, she was not following specific quality control instructions and she was creating disharmony among her co-workers.

43. Cabrera did not introduce any evidence showing that she opposed Blanch's threats to Llampallas or that she participated in any type of Title VII procedure against Blanch during her employment at Mini-Circuits. As such, the court finds that Cabrera did not present sufficient evidence to establish a prima facie case of retaliatory discharge and, therefore, there is no need for the court to resolve this conflicting testimony.

3. Damages

44. The court finds that the parties have not adequately addressed the issue of damages. Accordingly, the parties are Ordered to file supplemental memoranda on this issue. Counsel may adopt by reference any prior portions of

memoranda treating the issue of damages, so as to avoid repetition. Plaintiff shall file a memorandum, within ten (10) days of this Memorandum Opinion and Order, specifically delineating the amount of damages sought. Defendant shall file a responsive memorandum within ten (10) days of receiving plaintiff's memorandum. Plaintiff shall file a reply memorandum within five (5) days of receiving defendant's response. At that point, the court will make the appropriate determination on the amount of damages to be awarded.

CONCLUSIONS OF LAW

In light of the findings of fact recited above, the Court reaches the following conclusions of law:

4. Elba Llampallas

45. Mini-Circuits and Palmetto are a single integrated enterprise for the purposes of classification as employers under Title VII. *Stockett v. Tolin*, 791 F. Supp. 1536 (S.D. Fla. 1992).

46. Llampallas' assertion of same sex harassment by Blanch is actionable. *Joyner v. AAA Cooper Transp.*, 597 F. Supp. 537, 541 (M.D. Ala. 1983), *aff'd per curiam*, 749 F.2d 732 (11th Cir. 1984).

47. In order to establish a violation of Title VII on the grounds of quid pro quo sexual harassment, an employee must prove that (1) he/she belongs to a protected group; (2) he/she was subject to unwelcome sexual harassment; (3) the harassment was based upon sex; (4) his/her reaction to the harassment affected tangible aspects of his/her compensation, terms, conditions, or privileges of employment and (5)

respondeat superior. *See Henson v. City of Dundee,* 682 F.2d 897, 909 (11th Cir. 1982).

48. Llampallas has established a *prima facie* case of *quid pro quo* sexual harassment. First, she is a woman and, thus, belongs to a protected group. Second, she was subject to unwelcome sexual harassment. Llampallas introduced direct evidence to the effect that Blanch threatened to have Llampallas fired if she did not resume a sexual relationship with Blanch. Third, the harassment was based upon the fact that Llampallas was a woman and that both women are lesbians. Fourth, the harassment affected a tangible aspect of Llampallas' employment in that Blanch made good on her threat and got Llampallas fired. Due to the fact that Blanch could not work with Llampallas once they were no longer lovers, Blanch telephoned Kaylie in May of 1991 telling him she was quitting because of Llampallas. This, in effect, forced Kaylie to choose between the two women. He put Llampallas on suspension while he tried to find another facility for Llampallas (although her work performance was allegedly declining) and once that fell through, he had no choice but to terminate Llampallas. Fifth, Kaylie is strictly liable for Blanch's actions towards Llampallas. *See Henson, id.* at 910 ("We hold that an employer is strictly liable for the actions of its supervisors that amount to sexual discrimination or sexual harassment resulting in tangible job detriment to the subordinate employee.")[6]

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[6] The court recognizes that Llampallas was an employee at will; thus, her employer, Mini-Circuits, was free to discharge her for any reason or no reason, provided that such discharge was not discriminatory. Nevertheless, under the *quid pro quo* theory of sexual harassment, the employer is liable for any conduct of its supervisors which is found to be in violation of the statutory protection. It is upon this theorem that the Court has made its decision as it relates to this claim.

49. Once the plaintiff has come forth with direct evidence of sexual harassment violative of Title VII, to avoid liability, the defendant must prove by a preponderance of the evidence that it would have made the same decision irrespective of the harassment. *See generally Price Waterhouse V. Hopkins,* 490 U.S. 228, 104 L. Ed. 2d 268, 109 S.Ct. 1775 (1989). As set forth in the previous paragraph, Llampallas has presented direct evidence of sexual harassment. Thus, the next inquiry for the court is whether Mini-Circuits has proven by a preponderance of the evidence that it terminated Llampallas for a non-discriminatory reason.

50. Mini-Circuits has failed to prove by a preponderance of the evidence that it terminated Llampallas because of her poor work performance and her refusal to implement new organizational and quality policies. Llampallas' salary history reflects numerous raises and bonuses during the years 1989 to 1990, indicating that Mini-Circuits regarded Llampallas as a good employee and that the company was performing well in her presence. Additionally, the documentary evidence introduced at trial (and specifically delineated in the Findings of Fact above) shows that Mini-Circuits did not begin implementing the organizational and quality policies that it claims Llampallas refused to follow and implement until mid-May, 1991. The documentary evidence reveals that the majority of the policy changes did not occur until after Llampallas' suspension. Furthermore, the loan Kaylie gave Llampallas in April of 1991 shows that he was not contemplating discharging her at that time because the loan was payable at $50.00/week and it would take four and one-half years to pay back the loan. Therefore, the court cannot conclude, by a preponderance of the evidence, that Mini-Circuits suspended and terminated Llampallas because of her work performance and her inability to adapt to new policies.

51. The testimony of Mini-Circuits' supervisors who testified regarding Llampallas' attitude towards them, her vulgar language when criticizing their work, her refusal to pay them for overtime and Blanch's testimony, as well as that of two other supervisors, regarding vulgar comments made by Llampallas to Blanch around May 22, 1991, is all after-acquired evidence. Many of the supervisors testified that they did not complain to Blanch or Kaylie about Llampallas for fear of losing their jobs. Since Mini-Circuits did not introduce evidence as to when it learned of the after-acquired evidence or that it would have terminated Llampallas on these grounds alone, the court may not consider this testimony in deciding this case. *McKennon v. Nashville Banner Publishing Co.*, 130 L. Ed. 2d 852, 115 S.Ct. 879 (1995).

52. Accordingly, the court concludes that Blanch's behavior toward Llampallas constituted *quid pro quo* sexual harassment, that Kaylie is strictly liable for this behavior, and that Mini-Circuits' termination of Llampallas' employment was in violation of Title VII.

53. Palmetto's discharge of Llampallas from her Board position and officer duties was a direct result of Llampallas' discharge from Mini-Circuits.

5. Silvia Cabrera

54. Cabrera has failed to establish a prima facie of retaliatory discharge by Mini-Circuits.

55. Cabrera did not present any direct evidence of retaliation. Cabrera simply testified that Mini-Circuits terminated her employment in retaliation for Llampallas' refusal to resume sexual relations with Blanch because Cabrera

was a witness to one of Blanch's threats and she was good friends with Llampallas.

56. Where there is no direct evidence of retaliation, the plaintiff may prove a *prima facie* case by proving "(1) that there was a statutorily protected participation, (2) that an adverse employment action occurred, and (3) that there was a causal link between the participation and the adverse employment action." *Simmons v. Camden County Bd. of Educ.*, 757 F.2d 1187, 1189 (11th Cir.), *cert. denied*, 474 U.S. 981, 88 L. Ed. 2d 338, 106 S.Ct. 385 (1985).

57. Under the first prong of the analysis, the court must find that Cabrera engaged in an activity protected by Title VII. For purposes of retaliation, this means that she must prove she was discriminated against and terminated because she opposed an employment practice deemed unlawful under Title VII or because she made a "charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under [Title VII]." *Coutu v. Martin Cty. Bd. of Cty. Comm'rs.*, 47 F.3d 1068, 1074, *citing* 42 U.S.C. § 2000e-3(a).

58. Cabrera has failed to meet this first prong. She did not present any testimony, direct or circumstantial, showing that she opposed Blanch's threats to Llampallas. While she did testify that she witnessed a threat, this does not rise to the level of opposition. Nor did Cabrera introduce any evidence to the effect that she participated in any kind of Title VII proceeding against Blanch for her harassment prior to the commencement of this action and during her employment with Mini-Circuits. Again, her testimony was simply that she witnessed a threat; she was friends with Llampallas; after Blanch moved out of the house her attitude changed toward Cabrera and Mini-Circuits terminated her from her employment soon after Llampallas was

suspended. Nothing in her testimony suggests that she was engaging in a protected activity such that her discharge would have been in retaliation for that activity.

59. Given that Cabrera has failed to establish the first prong necessary to prove a prima facie case for retaliation, she has failed to meet her burden of proof. Since she cannot prove a prima facie case for retaliation, the burden does not shift to Mini-Circuits to establish a legitimate and non-discriminatory reason for discharging her. Accordingly, the court's analysis ends here.

CONCLUSION

In light of the foregoing and based on the entire record, it is

ORDERED AND ADJUDGED as follows:

1) Judgment shall be entered in favor of plaintiff Elba Llampallas against defendants Mini-Circuits and Palmetto;

2) Judgment shall be entered in favor of defendants Mini-Circuits and Palmetto against plaintiff Silvia Cabrera;

3) The court shall ***DEFER*** ruling on the amount of damages to be awarded Llampallas until it has reviewed the memoranda requested from the parties in Section 3 of this Memorandum Opinion and Order. At that point, the court will enter a Supplemental Memorandum Opinion and Order; and

4) The court shall ***DEFER*** entry of a Final Judgment until it has ruled on the issue of damages.

DONE AND ORDERED at Miami, Florida, this 19th day of May, 1995.

/s/ C. Clyde Atkins
SENIOR UNITED STATES DISTRICT JUDGE

cc: Hon. Magistrate Judge Turnoff
Bernard B. Weksler, Esq.
William G. Bell, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

ELBA LLAMPALLAS and
SILVIA CABRERA,

Plaintiffs,

Case No.
93-2053-CIV-ATKINS

v.

MINI-CIRCUITS LAB., INC.,
and PALMETTO EXTRA
CONDOMINIUM ASSOCIATION, INC.

Defendants.
_____/

SUPPLEMENTAL MEMORANDUM OPINION AND ORDER

THIS CAUSE came before the Court for non-jury trial on February 28, 1995, March 1, 2, 3, 13 and 14, 1995, and April 10 and 11, 1995. Elba Llampallas (Llampallas) and Silvia Cabrera (Cabrera), brought this action for violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, *et seq*. In its Memorandum Opinion and order of May 19, 1995, this Court ordered that judgment should be entered in favor of plaintiff Llampallas against the defendants and in favor of defendants against plaintiff Cabrera. The Court deferred ruling on the issue of Llampallas' damages so that the parties could fully brief the issue for the Court, which the parties have done.

FINDINGS OF FACT

At trial, the Court received documentary and testimonial evidence on the issue of damages. Dr. Robert L. Lessne testified regarding Llampallas' ability to secure comparable future employment as well as her past and future damages. With the exception of certain testimony by the defendants taking issue with the job descriptions used by Dr. Lessne in his evaluation, the defendants did not controvert Dr. Lessne's findings and calculations at trial. As such, the Court adopts Dr. Lessne's findings and analysis. Therefore, based on this evidence and on this Court's previous finding of credibility in favor of plaintiff Llampallas and her witnesses, the Court makes the following findings of fact:

1. On May 24, 1995, Harvey Kaylie (Kaylie) placed Llampallas on suspension, effective May 27, 1991, at her full pay of $1,000/week.

2. On November 8, 1991, Kaylie informed Llampallas that he was terminating her from her employment with Mini-Circuits. In January of 1992 Palmetto terminated Llampallas from her positions as a member of the Board of Directors and as Vice-President.

3. In 1990, Llampallas earned $82,729.70 from Mini-Circuits. This amount included Llampallas' straight salary of $25.00/hour, overtime and two bonuses ($9,000 and $10,000) (See Plaintiffs' Exhibit 59).

4. Given Llampallas' minimal formal education, limited English, age and Mini-Circuit's refusal to give her a recommendation, Llampallas will never be able to regain a position and salary such as she held at Mini-Circuits.

5. Had Mini-Circuits not wrongfully discharged Llampallas, she would have earned $388,303.52 at Mini-Circuits between 1991 and 1994. This figure is based on a 1990 Wage Base of $82,729.70 and a Growth/Productivity Rate of 6.5% year.[7]

6. Llampallas' actual wages earned between 1991 and 1994 were $97,797.82 (See Plaintiffs Exhibit 52(B) and Exhibit 62).[8] These earning were a result of Llampallas' effort to find comparable employment with Engles Engineering Corp., Telectronics, Cordis and Bronwing Lab after her termination. Defendants did not introduce any testimony suggesting that Llampallas was not diligent in her efforts to find a job.

7. As a result of Llampallas' wrongful termination, Llampallas additionally lost $4,209.23 in deferred compensation benefits as well as $24,441.56 in health insurance benefits.

8. Llampallas has a Working Life Expectancy of 15 years, is in good health and most likely will meet her

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[7] This projected 6.5% increase per year is a very conservative figure compared to Llampallas' increases of 26% in 1989 and 13.6% in 1990 (See Plaintiffs' Exhibit 59).

[8] This amount includes the value of the Lincoln car ($15,080.50) which Kaylie gave to Llampallas. Defendants assert that the amount of the car should be further deducted from Llampallas' backpay award because the car was a severance item. However, the documentary evidence shows, and Kaylie testified at trial, that the value of the car was included in Llampallas' 1991 W-2 report (See Plaintiffs' Exhibit 12 and Exhibit 19). Therefore, the value of the car is properly included in Llampallas' 1991 actual wages, and this, is included in the $97,797.82 total actual wages.

Working Life Expectancy. Had Llampallas remained with Mini-Circuits from 1995 through her Working Life Expectancy, she would have earned at least a total of $2,740,973.06. This figure is based on a projected 1994 Wage Base of $106,428.98 and a Growth/Productivity Rate of 6.5% for each year. The present value of this amount, based on a 6.24% discount rate, is $1,628,050.01. Her projected actual future earnings total $351,433.80. This figure is based on her 1994 Actual Wage and a Growth/Productivity Rate of 5.5%. The present value of this amount, also based on a 6.24% discount rate, is $210,950.02.

9. The position which Llampallas held at the time of her discharge no longer exists. According to Marta Blanch's testimony, the responsibilities of that position are now distributed among the group leaders, who are now individually responsible for their own groups.

10. Llampallas' compensation from defendant Palmetto was so small that her damages from the loss of wages is diminimus. Llampallas testified that she was distraught over the events that led up to this lawsuit and that she had visited a psychologist on a few occasions. However, the Court does not find that this testimony is sufficient proof of any emotional pain and suffering so as to warrant an award of compensatory damages against defendant Palmetto.

11. Additionally, the Court does not find that Llampallas presented any evidence of malice or reckless indifference on the part of Palmetto.

CONCLUSIONS OF LAW

In light of the findings of fact recited above, the Court reaches the following conclusions of law:

12. A plaintiff found to have been wrongfully terminated under Title VII is presumptively entitled to an award of backpay. *See Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1526 (11th Cir. 1991); *Nord v. United States Steel Corp.*, 758 F.2d 1462, 1472 (11th Cir. 1985); *Sennello v. Reserve Life Ins. Co.*, 667 F. Supp. 1498, 1512 (S.D. Fla. 1987), *aff'd*, 872 F.2d 393 (11th Cir. 1989).

13. The award of backpay should not only be the plaintiff's straight salary, but should also include "health insurance coverage, life insurance benefits, annual retirement contributions, and profit sharing." *Sennello*, 667 F. Supp. at 1512. Additionally, "the Court may taken into account any salary increases[9] that [the plaintiff] could reasonably have expected to receive had [he or she] not been terminated for discriminatory reasons . . . [as well as] vacation pay, medical benefits and pension benefits." *Bonura v. Chase Manhattan Bank, N.A.*, 629 F. Supp. 353, 355 (S.D.N.Y. 1986).

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[9] Defendants urge the court to conclude that salary bonuses should not be included in the calculation of backpay, citing the Bonura case. However, in that case, the parties stipulated that bonuses were not mandatory and based on that fact, the court concluded that any lost bonus award would be too speculative. Conversely, in this case, Mini-Circuits' rules provided that two annual bonuses were to be given by the company (See Plaintiffs' Exhibit 32) and, in fact, they were. Not only were they given, but they comprised a large portion of Llampallas' salary each year (See Plaintiffs' Exhibit 59).

14. In calculating backpay, the Court must first look to see if the plaintiff met the burden of proving that his or her damages are. If so, then the burden shifts to the employer to show that the plaintiff is not entitled to that amount of backpay, either by showing evidence of interim earnings or evidence that plaintiff did not diligently search for employment. If the employer does not present any evidence other than the plaintiff's testimony to support its claim that plaintiff is not entitled to that amount, then the Court must determine the amount of backpay based on plaintiff's apparent credibility. *See Sennello*, 667 F. Supp. at 1514-15.

15. Llampallas has met her burden of proving what her backpay damages should be. Defendants did not present any evidence indicating that Llampallas "did not exercise reasonable diligence to obtain [substantially equivalent work] . . . [or] has not made reasonable efforts to obtain [any] work." *Sellers v. Delgado College*, 902 F.2d 1189, 1193 (5th Cir. 1990).[10] All that the Court has before it on the issue of mitigation is Llampallas' testimony. Thus, defendants have "left the determination of plaintiff's diligence to be decided by the Court based upon its assessment of plaintiff's credibility." *Nord*, 758 F.2d at 1471. In its May 19, 1995 Memorandum Opinion and Order, this Court made a finding of credibility in favor of Llampallas and, therefore, finds that based on Llampallas' testimony at trial, she exercised reasonable diligence in obtaining interim employment.

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[10] *See also Nord*, 758 F.2d at 1470-71; *Weaver*, 922 F.2d at 1527; and *Bonura*, 629 F. Supp. at 356 ("burden is on the defendant, however, to prove that plaintiff has failed in his duty to mitigate.")

16. Therefore, Llampallas backpay award is as follows:

Past wages:	$290,505.70[11]
Health Insurance:	24,441.56
Deferred Compensation:	4,209.23
Total	$319,156.49

17. Additionally, a successful Title VII plaintiff is presumptively entitled to either reinstatement or front pay. *Nord*, 758 F.2d at 1473; *Weaver*, 922 F.2d at 1528. In this case, the Court concludes that reinstatement is not feasible given that the position Llampallas held at the time of her discharge no longer exists. If the Court decides to award front pay as an alternative to reinstatement, it "must bear in mind that awards of front pay, like other relief under Title VII, must be fashioned in a manner to 'further the goals of ending illegal discrimination and rectifying the harm it causes.'" *Nord*, 758 F.2d at 1473-74. The Court concludes that, in light of the fact that Llampallas will never be able to find comparable employment at a similar salary, she should be awarded front pay up through her Working Life Expectancy. As such, the Court finds that Llampallas should receive front pay in the amount of 1,417,099.99.[12]

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[11] This figure is based on Llampallas' projected wages at Mini-Circuits between 1991 and 1994 ($388,393.52) less her actual wages during that time period, i.e., interim earnings ($97,797.82).

[12] This amount is derived from the present value of Llampallas' projected earning has she stayed with Mini-Circuits throughout her Working Life Expectancy ($1,628,050.01) less the present value of her projected actual earning throughout her Working Life Expectancy ($210,950.02).

18. In its May 19, 1995 Memorandum Opinion and Order, the Court rejected defendants argument that after-acquired evidence can limit liability and, for the same reasons, the Court rejects the argument today that after-acquired evidence can limit the amount of damages due here. The Court recognizes that under *McKennon v. Nashville Banner Publishing Co.*,[13] reinstatement and front pay may be barred, however, the employer must first prove that it would have fired the employee had it known of the wrongdoing at the time of discharge. The Court already has concluded that the defendants here did not make this showing.

19. Llampallas was discharged from Palmetto after the effective date of the Civil Rights Act of 1991 and, thus, may be entitled to compensatory and punitive damages. The Court concludes that Llampallas has not sufficiently proven any emotional suffering so as to warrant compensatory damages against Palmetto, nor has she demonstrated that the Palmetto acted "with malice or with reckless indifference" to entitle her to punitive damages. 42 U.S.C. § 1981a(b)(1).

20. The Court concludes that the above backpay and front pay awards are sufficient to fulfill the purposes of Title VII and make Llampallas whole by placing her in the position she "would have been absent the discriminatory actions." *Nord*, 758 F.2d at 1470.

CONCLUSION

In light of the foregoing and based on the entire record, it is

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[13] 115 S.Ct. 879 (1995).

ORDERED AND ADJUDGED that plaintiff Llampallas shall recover the amount of $1,736,256.48 in damages from the defendants.

DONE AND ORDERED at Miami, Florida, this 11th day of July, 1995.

/s/ C. Clyde Atkins
SENIOR UNITED STATES DISTRICT JUDGE

cc: Hon. Magistrate Judge Turnoff
Bernard B. Weksler, Esq.
William G. Bell, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

ELBA LLAMPALLAS and
SILVIA CABRERA,

Plaintiffs,

Case No.
93-2053-CIV-ATKINS

v.

MINI-CIRCUITS LAB., INC.,
and PALMETTO EXTRA
CONDOMINIUM ASSOCIATION, INC.

Defendants.
_____/

FINAL JUDGMENT

THIS CAUSE came before the Court, Honorable C. Clyde Atkins, Senior United States District Judge, presiding, for non-jury trial on February 28, 1995, March 1, 2, 3, 13, 14, 1995, and April 10 and 11, 1995. The issues having been duly tried and a decision having been duly rendered, it is

ORDERED AND ADJUDGED as follows:

1) judgment is entered in favor of plaintiff Elba Llampallas against defendants Mini-Circuits Lab., Inc. and Palmetto Extra Condominium Association, Inc., and plaintiff Llampallas shall recover the sum of $1,736,256.48 from defendants; and

2) judgment is entered in favor of defendants against plaintiff Silvia Cabrera and plaintiff Cabrera shall take nothing.

DONE AND ORDERED at Miami, Florida, this 11th day of July, 1995.

/s/ C. Clyde Atkins
SENIOR UNITED STATES DISTRICT JUDGE

cc: The Honorable
Counsel of record

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 95-5258

ELBA LLAMPALLAS,

Plaintiff-Appellee,

SILVIA CABRERA,

Plaintiff,

versus

MINI-CIRCUITS, LAB., INC.,
PALMETTO EXTRA CONDOMINIUM
ASSOCIATION, INC.,

Defendants-Appellants.

On Appeal from the United States District Court for the
Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, _____F.2d_____).

Before: TJOFLAT and EDMONDSON, Circuit Judges, and O'NEILL*, Senior District Judge.

(April 12, 1999)

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that he Court be polled on rehearing en ban (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Gerald Bard Tjoflat
UNITED STATES CIRCUIT JUDGE

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*Honorable Thomas N. O'Neill, Jr., Senior U.S. District Judge for the Eastern District of Pennsylvania, sitting by designation.

Supreme Court, U.S.
FILED
SEP 3 1999
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

No. 99-231

ELBA LLAMPALLAS,
Petitioner,

v.

MINI-CIRCUITS LAB., INC., MINI CIRCUITS LAB., INC. by and through its Assignee, DONALD KAPLAN, and PALMETTO EXTRA CONDOMINIUM ASSOCIATION, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

Ross Bricker
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

Paul M. Smith *
Bruce J. Ennis, Jr.
Jodie L. Kelley
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000
Counsel for Respondents

**Counsel of Record*

September 7, 1999

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IN THE

Supreme Court of the United States

No. 99-231

ELBA LLAMPALLAS,

Petitioner,

v.

MINI-CIRCUITS LAB., INC., MINI CIRCUITS LAB., INC. by and through its Assignee, DONALD KAPLAN, and PALMETTO EXTRA CONDOMINIUM ASSOCIATION, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

Petitioner asks this Court to grant review of a decision that applies well-settled legal principles to a highly unusual, if not unique, factual situation. In so doing, she conjures up supposed conflicts between the Eleventh Circuit's ruling and prior decisions of this Court and the Ninth Circuit, by mischaracterizing the reasoning of the court below and by ignoring the facts that make this case unique. Because petitioner's effort to manufacture a basis for a grant of certiorari is unpersuasive, the petition should be denied.

STATEMENT OF THE CASE

This case arose after the termination of a thirteen-year domestic partnership, shared by two women who worked together at respondent Mini-Circuits, Inc. Marta Blanch was number two in the hierarchy at Mini-Circuits, a small manufacturing concern in Florida. Petitioner Ella Llampallas was number three. Pet. App. 34. Their terminated relationship led to a great deal of friction in the workplace, including, according to testimony credited by the district court, threats by Blanch that if petitioner did not resume the relationship she would be fired. Pet. App. 35. Eight months after the break-up, on the occasion of an altercation with petitioner, Blanch called the owner and President of Mini-Circuits, Harvey Kaylie, who resided in New York, and stated that she was quitting because she could no longer work with petitioner. Kaylie told her not to resign and called petitioner to New York for a meeting. *Id.* At that meeting, petitioner never talked about the source of the friction between the two women and never mentioned that she had been threatened with dismissal. Pet. App. 27. Indeed, until this suit was filed, Kaylie never had any knowledge of the nature of the prior relationship between petitioner and Blanch, and never heard about any threats made by Blanch after the relationship ended. Pet. App. 29-30 & n.24.

Kaylie's response to the situation presented to him was to propose that petitioner take over management of an additional company facility to be opened soon in Florida. Until that could happen, he placed petitioner on leave with full pay, and flew her to New York on several occasions over the next six months for training related to her new position. Petitioner also undertook a search for a new location for the proposed facility. Pet. App. 37. Eventually, however, Kaylie determined that the

new facility was not economically justified and notified petitioner that her employment had been terminated. Pet. App. 38.

Petitioner brought suit under Title VII, claiming that the termination was actionable "quid pro quo" sexual harassment. After a bench trial, the district court ruled in favor of petitioner and awarded $1.7 million in "back pay" and "front pay." In so ruling, the district court did not suggest that Kaylie had any illegitimate intent. To the contrary, it specifically found that the sole motivation for Kaylie's decision to suspend and later terminate petitioner was his desire to keep his most valuable employee, Marta Blanch, from quitting. Pet. App. 44.

The district court also never made a finding that Blanch's resignation was a ploy designed by Blanch to cause Kaylie to fire petitioner. To the contrary, in its conclusions of law, the court stated that Blanch's resignation was "[d]ue to the fact that Blanch could not work with [petitioner] once they were no longer lovers." Pet. App. 44. "This," the court added, "*in effect*, forced Kaylie to choose between the two women." *Id.* (emphasis added). But the court nevertheless determined that Mini-Circuits was strictly liable for sexual harassment based on five factors: (1) that petitioner is a woman, (2) that Blanch made threats of termination if petitioner did not resume a sexual relationship, (3) that those threats were based on petitioner's gender and sexual orientation, (4) that petitioner was ultimately terminated by Kaylie, after a chain of events that began when Blanch tried to resign, and (5) that Blanch is a supervisor. *Id.*

The Eleventh Circuit reversed. Analyzing the unusual situation presented in this case, the court went back to first principles, applying the three basic elements of a Title VII intentional discrimination claim: (1) discriminatory animus, (2)

an alteration in the terms and conditions of employment by the employer, and (3) a causal link between the two. Pet. App. 18 (citing cases). It noted that in the usual case, where "an employee of the defendant has 'sexually harassed' the plaintiff, and the harassing employee then takes a 'tangible employment action' against the plaintiff," Pet. App. 19-20, it is relatively easy to infer that the employee harbored discriminatory animus and was motivated by that animus in taking the tangible employment action. Pet. App. 20-22. But the court added that the "causal link" between animus and action is far less automatic where, as here, the person with the animus is not the person who takes the action, and the latter has no knowledge of any inappropriate threats or motives on the part of the former.

Here, the court noted, the district court's own findings make clear that "when Kaylie terminated [petitioner's] employment, he did so *because he wished to retain Blanch*," and not because he harbored any inappropriate or discriminatory motives or feelings. Pet. App. 25 (emphasis in original). It then held that, based on all the circumstances presented, there was an insufficient causal link between the animus of Blanch and the action taken by Kaylie. In so ruling, the court distinguished cases in which the decisionmaker was a mere "cat's paw," with no choice but to carry out the "recommendation" of the person in the workplace harboring discriminatory animus. "In the cat's paw situation," the court stated, "the harasser clearly causes the tangible employment action, regardless of which individual actually signs the employee's walking papers." Pet. App. 26. But this case, the court held, is quite different, because Blanch communicated no decision or recommendation to Kaylie suggesting that any sort of action be taken against petitioner. "The only 'decision' Blanch made was to quit Mini-Circuits because she 'couldn't work with [petitioner] anymore." Pet. App. 27.

The court recognized that Blanch may have resigned in order to "manipulate the company" into firing petitioner. *Id.* But it did not need to decide whether a company can be held liable because of a decisionmaker's immediate "unwitting compliance" with such manipulation. Here, instead of firing petitioner as a direct response to Blanch's possibly strategic ploy of resigning, Kaylie called petitioner to a meeting, where petitioner disclosed "neither her sexual relationship with Blanch" nor "developments upon the demise of that relationship." *Id.* Kaylie then went to considerable trouble and expense in an unsuccessful effort to find a separate slot for petitioner that would allow the company to keep both women as employees. The court held that "Mini-Circuits, through Kaylie, 'broke the chain' of causation between Blanch's harassment and its decision to terminate [petitioner's] employment both because it behaved reasonably in response to Blanch's threat to quit, and because [petitioner] herself failed to avoid the consequences of that threat." Pet. App. 29.

Prior to issuing its opinion, the Eleventh Circuit received supplemental briefing on the impact of this Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998), and *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998). It cited and discussed those decisions repeatedly in the opinion, concluding that they in no way mandated affirmance of a claim based on the facts presented here.

ARGUMENT

The ruling below involves no issue of general or continuing importance and does not conflict in any way with the prior rulings cited by petitioner. The highly unusual question presented here is whether a termination is a form of actionable sexual harassment where (1) it is ordered by a supervisor who has no knowledge of any prior threats and

whose only motive is a legitimate desire to retain another valued employee who has tried to resign, (2) that supervisor gave the plaintiff a full opportunity to explain the situation to him but she did not, and (3) that supervisor kept the plaintiff on the payroll for six months while trying to arrange alternate employment for her before reluctantly ordering the termination. A case involving such facts, by its very nature, will have little impact on the lower courts' handling of the more usual types of sexual harassment claims. Moreover, the suggestion that the issues raised here were addressed in a conflicting way by this Court and the Ninth Circuit in recent cases is insupportable. The petition accordingly should be denied.

I. The Eleventh Circuit's Ruling is Entirely Consistent with *Burlington* and *Faragher*.

The essence of the Eleventh Circuit's ruling was that a termination cannot be said to have been caused by discriminatory animus where (1) the person who uttered threats linked to demands for a sexual relationship, and who accordingly can be inferred to have had discriminatory motives, did not order or even recommend the termination, (2) the decisionmaker who ordered the termination had no knowledge of the threats, was solely motivated by a desire to retain another more valuable employee, had previously given the plaintiff a full opportunity to explain the situation, and had tried for several months to find a way to retain both employees. Petitioner's primary argument is that this ruling conflicts with *Burlington* and *Faragher*. That argument is completely unpersuasive. Those cases did not involve facts remotely resembling this case. Moreover, the underlying legal principles enunciated by this Court in no way contradict the reasoning of the Eleventh Circuit.

In both *Burlington* and *Faragher*, the conduct plaintiff was complaining about was ongoing, pervasive harassment by specified supervisors -- *i.e.*, what the Court repeatedly called "misuse of supervisory authority." *Burlington*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2292. The issue in those cases was under what circumstances an employer is vicariously liable for such abuse of authority granted to a supervisor. The Court held that where the offending conduct was that of a supervisor misusing delegated authority, an employer is strictly liable for the acts of its "agent." *Burlington*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2292-93.[1]

Here, the issue is different. The *sole* conduct about which petitioner complained -- her termination -- was not ordered by the "harassing" supervisor; it was ordered by a company president who had no illegitimate animus whatsoever. The issue in this case is not vicarious liability for "misuse of supervisory authority," but whether the action at issue -- the termination ordered by an entirely "innocent" company president -- violated Title VII in the first place. As to that issue, *Burlington* and *Faragher* offer no support for petitioner's position.

Petitioner points to language in *Burlington* holding that employers are vicariously liable, with no affirmative defense based on the existence of a grievance procedure, "when the supervisor's harassment *culminates* in a tangible employment action, such as discharge." 118 S. Ct. at 2270 (emphasis added). She argues that her discharge was the "culmination" of Blanch's harassment. Pet. at 6. As she acknowledges,

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[1]The Court also recognized an affirmative defense in cases where no tangible adverse employment action has been taken, if the employer has in place a suitable grievance system. *Burlington*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2292-93.

however, the Eleventh Circuit specifically addressed this language, and concluded that this Court did not intend the term "culminates" to bring within the ambit of the strict liability rule those adverse actions (like petitioner's termination) that are *not* the result of any misuse of supervisory authority. Pet. App. 28 n. 23 ("we believe that the Court means to limit the exception to those cases in which the harasser acts *as the decisionmaker with respect to the action*, either in actuality or by using another as its 'cat's paw'") (emphasis added).[2]

That analysis is plainly correct. In several other places in the opinion, this Court stated that strict liability arises only when a *tangible adverse action* is taken directly *by the harassing supervisor*. *See, e.g.*, 118 S. Ct. at 2269 ("When a supervisor *makes a tangible employment decision*, there is assurance the injury could not have been inflicted absent the agency relation.") (emphasis added); *id.* ("The supervisor has been empowered by the company as a distinct class of agent to *make economic decisions* affecting other employees under his or her control.") (emphasis added); *id.* ("For these reasons, a tangible employment action *taken by the supervisor* becomes for Title VII purposes the act of the employer.") (emphasis added).

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[2]As noted above, the Eleventh Circuit had previously explained the difference between the "cat's paw" category of cases and this case:

> This, however, is not a cat's paw case. Kaylie's decision to suspend and discharge Llampallas was not simply a tacit approval of Blanch's own decision to do the same. Blanch communicated no adverse employment decision regarding Llampallas to Kaylie for his review; nor did she recommend that Kaylie take action against Llampallas. The only "decision" Blanch made was to quit....

Pet. App. 27.

More fundamentally, it would make no sense to expand strict liability in the manner proposed by petitioner. The justification for holding employers strictly liable for the tangible adverse actions of their supervisors is that such supervisors are abusing supervisory authority granted to them by the employer. That justification does not ap['y here, where there was never any claim that Blanch took any adverse action that involved an abuse of authority delegated to her by her employer.

Petitioner goes on to argue that the Eleventh Circuit's ruling inappropriately added a requirement that the employer have "actual or constructive knowledge of the harassment by its supervisor." Pet. at 9. But that entirely misconstrues the issue presented in this case. The court of appeals did not exonerate Mini-Circuits because it lacked actual or constructive knowledge of harassing conduct by one of its supervisors -- Blanch. It held that the sole act that formed the basis of petitioner's case -- her termination -- was not illegal under Title VII because it was not motivated by discriminatory animus. In this regard, it is important to recall that the conduct of Blanch did not itself constitute the conduct forming the basis of the discrimination complaint. Petitioner did not, for example, claim that Blanch had created a "hostile work environment." Instead, she sought to recover for an action ordered by Kaylie, albeit possibly as an indirect result of Blanch's initial resignation. In that context, the issue is not "actual or constructive knowledge" of Blanch's harassment. It is whether Blanch's illegal animus can be attributed to the person, Kaylie, who took the harmful action.

II. The Eleventh Circuit's Ruling Is Entirely Consistent with the Ninth Circuit's Ruling in *Burrell v. Star Nursery, Inc.*

Petitioner is equally incorrect in arguing that there is a conflict between the ruling below and the Ninth Circuit's ruling in *Burrell v. Star Nursery, Inc.*, 170 F.3d 951 (9th Cir. 1999). That case involved a straightforward application of this Court's rulings in *Burlington* and *Faragher*. The plaintiff claimed that a supervisor had created a hostile environment through suggestive comments and that he ultimately caused her dismissal by unfairly reprimanding her. The district court had granted summary judgment for the employer because there was no evidence that the employer had actual or constructive knowledge of this conduct. The Ninth Circuit reversed, after this Court issued its rulings in *Burlington* and *Faragher* holding that actual or constructive knowledge was not required in order to hold the employer liable for actions of a supervisor.

Nothing in *Burrell* addresses the separate question presented here about the proper treatment of a situation where the action complained of -- the termination -- was not taken by the person who had the improper animus. To the contrary, *Burrell* involved claims based on two types of conduct alleged to have been undertaken *by the harassing supervisor himself.* The first was creation of a hostile work environment -- a claim that petitioner in this case did not make. The second was the claim that the harassing supervisor, the manager of the store where the plaintiff worked, "terminated her because she had resisted his sexual advances." 170 F.3d at 956. Here, petitioner cannot make that claim either, because Blanch did

not "terminate her."[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Paul M. Smith *
Bruce J. Ennis, Jr.
Jodie L. Kelley
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Ross Bricker
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

**Counsel of Record*

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[3]Petitioner attempts to manufacture a conflict by pretending that the plaintiff in *Burrell*, like petitioner here, was "discharged by management, not her supervisor." Pet. at 10 (citing 170 F.3d at 954). But the cited page draws no such distinction between the supervisor's conduct and the conduct of "management." It says only that "Star Nursery" -- the corporate employer -- terminated the plaintiff. As we have noted, the court later made clear its understanding that the plaintiff was claiming to have been wrongfully terminated by the same supervisor alleged to have created the hostile work environment. It follows that *Burrell* has nothing to say about the issues presented here.